Supreme Court, U.S.
FILED
96 889 DEC 4 1996
OFFICE OF THE CLERK

No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

PRINCE GEORGE'S COUNTY, MARYLAND, *et al.*
Petitioners

v.

MARC ALEXANDER, *et al.*
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

BARBARA L. HOLTZ
Acting County Attorney
SEAN D. WALLACE
Deputy County Attorney
Prince George's County, Maryland
14741 Governor Oden Bowie Drive
Upper Marlboro, MD 20772
(301) 952-5237

HENRY R. LORD*
LEONARD E. COHEN
ANN L. LAMDIN
Piper & Marbury L.L.P.
36 South Charles Street
Baltimore, MD 21201
(410) 539-2530
* *Counsel of Record*

December 4, 1996

Attorneys for Petitioners

75 pp

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Fourth Circuit err in declaring unconstitutional Prince George's County, Maryland's 1984 Affirmative Action Plan for Fire Department hiring, when it found that the Plan did not survive strict scrutiny under this Honorable Court's decisions, 1989 through 1995?

2. Did the United States Court of Appeals for the Fourth Circuit err in striking the gender-based component of Prince George's County, Maryland's 1984 Affirmative Action Plan for Fire Department hiring, once it found that the race-based component of that Plan did not survive strict scrutiny?

PARTIES TO THE PROCEEDING

The Petitioners (defendants and appellees at trial and on appeal) are:

Prince George's County, Maryland

Fire Chief M. H. Estepp (Retired), in his official and individual capacities

Lt. Col. William H. Goddard, III (Retired), in his official and individual capacities

Lt. Col. Maureen Hennessy, in her official and individual capacities

Ms. Yvonne Tyler, in her official and individual capacities

The Respondents (plaintiffs and appellants at trial and on appeal) are:

Marc Alexander

Timothy Clark

George Frye

Angela Moore

Robert Moore

Josh Reedy

Richard Saxberg

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES v
INTRODUCTION 1
OPINIONS BELOW 3
JURISDICTION 3
CONSTITUTIONAL, STATUTORY, AND RELATED PROVISIONS INVOLVED 4
STATEMENT OF THE CASE 4
Proceedings Below 4
Statement of Facts 6
1. The Affirmative Action Plan 6
2. The Hiring Process for Firefighter Recruits 7
3. The February 1993 Firefighter Recruit Class 9
4. The June 1994 Firefighter Recruit Class .. 9
REASONS FOR GRANTING THE WRIT 10
The Fire Department's Affirmative Action Plan Is Lawful Under 42 U.S.C. § 1983 11
Applicable Legal Standards 11
Strict Scrutiny Review 12
The Fire Department Established That Its Plan Was Justified By A Compelling Governmental Interest 13
The Fire Department Established That Its Plan Was Narrowly Tailored 14
The Court of Appeals Ignored The County's Proof And Struck Down The Plan 15
The Court of Appeals Erred In Requiring That The Fire Department's Plan Must Benefit Only African Americans and Women 16

The Court of Appeals Erred In Requiring That The County, As A Prerequisite to Implementing An Affirmative Action Plan, Was Required To Waive The Volunteer Preference, Established By Ordinance 17
The Court of Appeals Erred in Analogizing This Case to Prior Fourth Circuit Cases Which Are Totally Dissimilar 19
The Court of Appeals Erred When It Struck Down The Entire Plan, Including Both Its Race and Gender Components . 20
CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Adarand Constructors, Inc. v. Peña, ___ U.S. ___, 115 S.Ct. 2097, 132 L.Ed 2d 158, 63 U.S.L.W. 4523 (1995) 10, 11

Alexander v. Prince George's County, Maryland, 901 F. Supp. 986 (D. Md. 1995), *aff'd in part reversed in part*, 95 F.3d 312 (4th Cir. 1996) .. 3, 15, 16, 17, 19, 20

Army & Air Force Exchange Service v. Sheehan, 456 U.S. 728 (1982) 10

Braen v. Pfeifer Oil Transportation Co., 361 U.S. 129 (1959) 10

Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979) 11

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 10, 11, 12, 13, 16, 17, 18

Clark v. Jeter, 486 U.S. 456 (1988) 20

Coral Constr. Co. v. King County, Washington, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992) 18

Fullilove v. Klutznick, 448 U.S. 448 (1980) 10

General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375 (1982) 12

Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207 (4th Cir. 1993) 20

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 13

Maryland State Troopers Ass'n, Inc. v. Evans, 993 F.2d 1072 (4th Cir. 1993) 20

Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) 21

Podberesky v. Kirwan, 956 F. 2d 52 (4th Cir. 1992) 19, 20

Schlude v. Commissioner, 372 U.S. 128 (1963) . 10

United States v. Paradise, 480 U.S. 149 (1987) 14

United States v. Virginia, _____ U.S. _____, 116 S.Ct. 2264, 135 L.Ed 2d 735, 64 U.S.L.W. 4638 (1996) 11, 20, 21

Wilkinson v. United States, 365 U.S. 399 (1961) 10

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 12

Constitutional Provisions—Federal and State

U.S. Const., Art. III 4

U.S. Const. Amend. XIV, Section 1 4

Constitution of Maryland, Article XI-A, Sections 1 and 3 1

Statutes—Federal

42 U.S.C. § 1981 (1870) 4, 12

42 U.S.C. § 1983 (1871) 4, 11, 12

Statutes and Ordinances—State and County

Maryland Annotated Code, Art. 25A, Section 5(A)(1) 1

Prince George's County Code § 16-109 (1976) 6

Prince George's County Code § 16-162 (1976, 1981) 8

Miscellaneous

Charter of Prince George's County, Maryland (1970, as amended), Article V .. 1

Prince George's County Government, Order of County Executive No. 15-1983, April 6, 1983 6

INTRODUCTION

Prince George's County, Maryland's population of 729,268 places it as the third largest of the State of Maryland's 24 political subdivisions. The County adjoins the District of Columbia and forms two-thirds of its border. In the past quarter-century, the County has undergone an extraordinary and unprecedented shift in the demographics of its population:

Census Year	County's Civilian Labor Force	
	Minority[1]	Female
1970	16.7%	40.9%
1980	41.5%	47.4%
1990	57.5%	49.9%

Prince George's County is governed under its 1970 home-rule Charter, with its executive and legislative branches led by an elected County Executive and an elected County Council. Constitution of Maryland, Art. XI-A §§1,3; Maryland Annotated Code, Art. 25A §5; Charter of Prince George's County Maryland, Article V §§501-02. (Appendix at pp. C-2 through C-4, C-7 through C-8).

In the 1970s and early 1980s, discrimination against African Americans and women in the Prince George's County Fire Department was rampant, pervasive, self-evident, and undeniable. In 1974 the County's Firefighter complement of 290 was 2.7% minority and 0.0% female. Ten years later, in 1984, the year that the Department's Affirmative Action Plan (a part of the County-wide hiring plan) for new hires was adopted, the Firefighter force was 19% minority (virtually all, African American) and 3% female, trailing

---

[1] The County's minority population is overwhelmingly African American. The 1990 Census figures establish that the County's civilian labor force was 3.5% Hispanic, 3.5% Asian, and 0.35% Native American.

unconscionably behind the population and workforce figures from the beginning of that decade.

This persistent discrimination in the Fire Department caused the United States Department of Treasury's Office of Revenue Sharing in 1981 to threaten to discontinue its federal funding to the County unless immediate corrective measures were taken.[2]

As a result of the Fire Department's Affirmative Action Plan, by September 1993 when this litigation was filed against it, the Department had swelled its Firefighter ranks to 38% minority, 15% female, 2% Hispanic, and 0.5% Asian.[3] The Department, aided immeasurably by its Plan, had developed a talented and highly professional public-safety cadre well positioned to serve its constituency, the changed and changing population of the County.

These gains in minority and female representation were not accomplished at the expense of other segments of the County population. For example, of the 72 Firefighters hired from 1990 through 1994, 36 were white males. The County has never hired a Firefighter who was not objectively rated by the Department as either Outstanding or Well-Qualified (*cf.* Qualified or Not-Qualified) under its evaluation system.

The Fire Department achieved this evolution in the years 1984-1994 by adhering strictly to the principles of lawful affirmative action laid out by this Court. The Fire Department and the sovereign government of Prince George's

---

[2] The Office of Revenue Sharing required the County to enter into a Compliance Agreement later that year. After the adoption of the Department's Plan, the Office of Revenue Sharing recognized the progress which the Department had made in recruiting and hiring minorities and females, and ceased its formal monitoring efforts.

[3] By the end of calendar year 1993, there were 449 persons employed by the County in the Fire Department Protective Services category, which since 1989 had included Firefighters, Paramedics, and Emergency Medical Technicians.

County achieved a measure of success for which they are justifiably proud. States, counties, and cities in this country, facing similar sudden demographic upheavals, would do well to turn to the County and its Fire Department for guidance.

Regrettably, the United States Court of Appeals for the Fourth Circuit has found that this Affirmative Action Plan violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and henceforth may not be used in Firefighter hiring.

No affirmative action plan can weather the sort of post-hoc, hypertechnical, and wrong-headed analysis brought to bear by the Court of Appeals in this case. Perfection, as required by the panel below, is simply beyond the capacity of any government to attain, as it strives in the best of faith to meet the ephemeral, will-o'-the-wispish, "strict scrutiny" standard.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, filed September 5, 1996 (Appendix A), is reported at 95 F.3d 312. The opinion and order of the United States District Court for the District of Maryland, Southern Division, filed October 11, 1995 (Appendix B), is reported at 901 F. Supp. 986.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was filed on September 5, 1996. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND RELATED PROVISIONS INVOLVED

United States Constitution, Art. III
United States Constitution, Amendment XIV, Section 1
Constitution of Maryland, Article XI-A, Sections 1 and 3
42 U.S.C. §1981 (1870)
42 U.S.C §1983 (1871)
Maryland Annotated Code, Art. 25A, Section 5(A)(1)
Prince George's County Code §16-109 (1976)
Prince George's County Code §16-162 (1976, 1981)
Charter of Prince George's County, Maryland, Art. V (1970, as amended)
Prince George's County Government, Order of County Executive No. 15-1983, April 6, 1983

* * *

These provisions are printed in Appendix C.

STATEMENT OF THE CASE

Proceedings Below

Respondents are six white males and one white female, five of whom were not hired as Firefighters by the Fire Department of Prince George's County, Maryland in either of the Recruit Classes challenged in this litigation: the February 1993 Class (13 Recruits) and the June 1994 Class (7 Recruits).

Their Complaint was filed on September 9, 1993 and was amended twice over the following year. As amended, it alleges race and gender discrimination in violation of Section 1 of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§1981 and 1983. It seeks compensatory damages (including back pay and benefits, and retroactive seniority), punitive damages, an order requiring that Respondents be hired, injunctive and declaratory relief, and attorneys' fees and costs against Petitioners Prince George's County, Maryland, Fire Chief M. H. Estepp (now retired from

the Department), Lt. Col. William H. Goddard, III (now retired), Lt. Col. Maureen Hennessy, and Ms. Yvonne Tyler (a civilian employee of the Department).

After a year of extensive discovery, all Petitioners moved for summary judgment on December 23, 1994. Respondents filed a cross-motion for summary judgment as to liability on January 19, 1995. After oral argument before the trial court on the motions, on October 11, 1995 the District Court granted Petitioners' Motion for Summary Judgment, denied Respondents' cross-motion, and entered judgment for Petitioners. (Appendix B). Respondents noted a timely appeal to the United States Court of Appeals for the Fourth Circuit.

On September 5, 1996, a three-judge panel of the Court of Appeals affirmed in part, reversed in part, and remanded the case to the District Court for further proceedings. (Appendix A). The Court of Appeals held that (1) the Fire Department's Affirmative Action Plan was not narrowly tailored to achieve its goals because among those benefited by it were Hispanic and Asian minorities which the Department had not established in the record were the victims of past discrimination; (2) further proceedings were necessary to determine whether Mr. Reedy would have been hired in June 1994 but for the existence of the Plan; (3) the remaining six plaintiffs were not denied employment because of their race or sex and thus, were not entitled to any individual relief; and (4) reversing the finding of the District Court, the four individual defendants had not established that they are entitled to qualified immunity and thus, were subject to individual liability "because case law (about which a reasonable official would have known) had clearly established by 1993 and 1994 that the department's affirmative action program failed to satisfy the strict requirements of the Equal Protection Clause." (Appendix at pp. A-3 and A-12).

Statement of Facts

1. The Affirmative Action Plan

Prince George's County, Maryland's Affirmative Action Plan for all County hiring was adopted in conformity with Section 16-109(b) of the Prince George's County Code (Appendix at p. C-4), which required the County Executive to "establish the components of an affirmative action program for the County." In accordance with that directive, on April 6, 1983, County Executive Parris N. Glendening (the elected Governor of Maryland since 1994) issued Executive Order No. 15-1983, which instructed the County's Personnel Officer to develop, implement and monitor the County's Affirmative Action Plan. (Appendix at p. C-8).

Acting under the County Executive's Order, the Office of Personnel established hiring goals for new County employees using the 1980 Census civilian labor force statistics. The County's Affirmative Action Plan was a five-year plan, to be reviewed and renewed for another five years at the end of each June 30 fiscal year. Affirmative action goals were set by agency and County-wide. The Fire Department was directed to adopt its own Affirmative Action Plan and established its first Five-Year Affirmative Action Plan on July 17, 1984. Each year thereafter, each County agency and department including the Fire Department, in consultation with the Office of Personnel, established a percentage hiring goal for minorities and females within that agency or department.

In 1987, the Office of Personnel revised the County's Affirmative Action Plan to a "one-year plan with one-year goals" as well as long-term goals. The Fire Department's goal, a workforce that was 39% minority and 18% female, was not attained even after the hiring of the challenged 1993 and 1994 Firefighter Recruit Classes.

The creation of the Fire Department's Affirmative Action Plan was a lawful and reasoned effort to remedy the well-known race and sex discrimination in hiring and

employment practices which had existed in the Fire Department throughout its history, into the early 1980's. The record in this case establishes beyond question that (a) before, and to a lesser extent after, 1984 there was pervasive, rampant, and blatant discrimination in the Department against minority and female Firefighters, and (b) this discrimination was because of their race and sex.

Specifically, the record contains voluminous evidence of discrimination against African Americans and women, including statistical evidence of the gross underrepresentation of African Americans and women in the Department, as well as extensive and significant anecdotal evidence of discrimination: to wit, that African American Firefighters frequently were referred to as "niggers;" that African American Firefighters were subjected to racially derogatory pranks — for example, one Firefighter came into to work to find on his desk a cross inscribed with "R.I.P." and decorated with a sheet to resemble a Klansman's hood; that African American and female Firefighters received less training than their white male counterparts; that female Firefighters were physically assaulted, called names such as "bitch," "slut," and "whore," and subjected to sex-based hazing rituals. (See Appendix at pp. B-14 through B-15)

2. The Hiring Process for Firefighter Recruits

Each Respondent, and each Recruit in the challenged classes, completed the Firefighter application process, which includes a written application for employment, a written examination, and an oral interview. All applicants are placed on the Applicant Register in the order of their combined grades on the written examination and oral interview. The Applicant Register is then divided into three "eligibility bands" — Outstanding, Well Qualified, and Qualified.

Within each "band," applicants are then placed on the Applicant Register grouped by the preference, if any, to which they are entitled under the County's Personnel Law.

County Code §16-162. (Appendix at p. C-5). The statutory preferences for Firefighters, in order, are:

1) Prince George's County employees seeking promotions;

2) disabled veterans;

3) past or present volunteer firefighters who are also veterans;

4) veterans who are not disabled;

5) past or present volunteer firefighters who are not veterans;

6) displaced homemakers who are not veterans;

7) Prince George's County residents;

8) all other persons.

Applicants within the same "eligibility band" who have the same preference are listed in the order of their combined test scores. All applicants within a given "band" are considered equally qualified for hire.

Selections for the class are made first from the Outstanding "band." Assuming that the number of Recruits to be hired equals or exceeds the number of applicants in the Outstanding "band," all applicants in the Outstanding "band" are hired regardless of preference, race, or gender. Once that usually narrow "band" is exhausted, selections are made from the Well-Qualified "band." If the Well-Qualified "band" were ever to be exhausted, selections would then be made from the Qualified "band." However, since the three-tiered "band" hiring system was adopted by the Fire Department in its original 1984 Plan, no Firefighter has been hired from the Qualified "band." In selecting applicants for hire from within the Well-Qualified "band," the Fire Department considers preference status and its Affirmative Action goals.

3. The February 1993 Firefighter Recruit Class

This challenged Class had 13 members. In furtherance of the Fire Department's Affirmative Action goals, an effort was made to include males, females, and minorities. That Class was made up of 4 white males, 4 black males, 3 white females, 1 black female, and 1 Hispanic male. Of the 13 Recruits, 4 (all white males) achieved scores classifying them as Outstanding and 9 achieved scores classifying them as Well-Qualified. Of the 13 Recruits, 7 received "volunteer preference:" 2 minority males, 3 white males, and 2 white females. The 4 white males were hired because they were in the Outstanding "band," without regard to preference or affirmative action goals.

4. The June 1994 Firefighter Recruit Class

This Class, the only other class challenged, had 7 members, including Marc Alexander and Angela Moore. Ms. Moore was hired by operation of the Department's Plan and its goals. She was hired instead of one of the other Respondents. The class was made up of 3 white males, 1 black male, 2 white females, and 1 Hispanic male. Of the 7 Recruits, 1 (a white male) achieved a score classifying him as Outstanding and 6 achieved scores classifying them as Well-Qualified. Of the 7 Recruits, 2 received "volunteer preference:" a minority male and Ms. Moore, a white female. The white male, not a "volunteer," was hired because he was in the Outstanding "band," without regard to preference or affirmative action goals.

REASONS FOR GRANTING THE WRIT

This Honorable Court has granted writs of certiorari when a federal court of appeals has "misconceived" or "misapprehended" an applicable ruling of this Court (*see e.g., Wilkinson v. United States*, 365 U.S. 399, 401 (1961); *Schlude v. Commissioner*, 372 U.S. 128, 130 (1963)); where the opinion below "seemed to be out of line with the [Supreme Court] authorities" (*Braen v. Pfeifer Oil Transportation Co.*, 361 U.S. 129, 130 (1959)); or where that opinion "appeared to be in conflict with . . . [Supreme Court] precedents" (*Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982)).

This Court's opinion eighteen months ago in *Adarand Constructors, Inc. v. Peña*, ___ U.S. ___, 115 S.Ct. 2097, 2113, 132 L.Ed 2d 158, 63 U.S.L.W. 4523 (1995), left no doubt that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *See also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Such classifications "are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors*, 115 S. Ct. at 2113.

In his concurring opinion in *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980), Justice Marshall concluded that for "governmental programs employing racial classifications for remedial purposes . . . conventional 'strict scrutiny' [is likely to be] . . . strict in theory, but fatal in fact." In *Adarand Constructors*, Justice O'Connor, writing for a majority of this Court, specifically laid to rest the apprehension that the strict scrutiny standard would invalidate all race-based affirmative action preferences, stating:

> The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate

> reality, and government is not disqualified from acting in response to it.

Id. at 2117. One year later, and just a few months ago, this Court re-emphasized that "strict scrutiny . . . is not inevitably 'fatal in fact.'" *United States v. Virginia*, ____ U.S. _____, 116 S.Ct. 2264, 2276 n.6, 135 L.Ed 2d 735, 64 U.S.L.W. 4638 (1996). This Court has thus clarified, most recently while the case at bar was *sub curia* at the Court of Appeals, that there is no sweeping prohibition to be visited upon affirmative action by federal, state, and local governments. *See also Croson*, 488 U.S. at 509-11.

Although the Court of Appeals acknowledged this Court's directives in *Adarand Constructors*, it surely "misconceived" or "misapprehended" the manner by which the strict scrutiny test should have been applied in this case.

Prince George's County, Maryland's Fire Department Affirmative Action Plan was conceived and implemented to rectify past discrimination of the most pernicious sort, has been notably successful in so doing, and accomplished this through appropriate and timely governmental action which withstands constitutional attack, even when strictly scrutinized.

The Fire Department's Affirmative Action Plan Is Lawful Under 42 U.S.C. § 1983

Applicable Legal Standards

42 U.S.C. § 1983 (1871) provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law . . . .

It is axiomatic that Section 1983 provides a vehicle for one seeking redress in court for the deprivation of a right "secured by the Constitution and laws" of the United States by a "person" acting "under color of" state law. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979).

Respondents have alleged under § 1983 that the Fire Department's Plan deprived them of the right, secured by the Equal Protection Clause, to be free from race and gender discrimination in hiring.[4]

Strict Scrutiny Review

There are, of course, two inquiries in applying strict scrutiny review. First, the use of racial classifications must be justified by a compelling governmental interest. There must be a "strong basis in evidence for . . . [the] conclusion that remedial action . . . [is] necessary." *Croson*, 488 U.S. at 500 (*quoting Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267,

---

[4] The Clause provides, in relevant part, that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, Section 1.

Respondents also have attacked the Plan under 42 U.S.C. § 1981 (1870), which provides in relevant part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .

A § 1981 plaintiff must prove that he is the victim of intentional race discrimination. *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982). Thus, the Plan withstands attack under §1981 for the reasons set forth herein with respect to §1983: the Department violated no constitutional rights of the Respondents, intentionally or inadvertently.

277 (1986)). Second, the means the government selects to effectuate its interest must be "narrowly tailored" to the achievement of that goal. *Croson*, 488 U.S. at 507. The "burden" of "demonstrat[ing] the unconstitutionality" of an affirmative action plan on equal protection grounds "remains" with the person attacking it. *Wygant*, 476 U.S. at 277-78.

The Fire Department Established That Its Plan Was Justified By A Compelling Governmental Interest

In determining whether the use of racial classifications is "justified by a compelling governmental interest," this Court has required proof of past race discrimination, including proof of statistical disparities corroborated by significant anecdotal evidence of specific instances of race discrimination. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 338 (1977). This Court also has required proof that the plan, as drafted, has a remedial purpose —that it is targeted at the past discrimination. *Croson*, 488 U.S. at 498-500.

The Fire Department proved that its Plan was "justified by a compelling governmental interest" — namely, remedying palpable and proven past discrimination. As set forth above, the County produced a wealth of statistical and anecdotal evidence of past discrimination, including evidence of a gross underrepresentation of minorities and females within the Department, compelling evidence of repeated and ongoing instances of race- and gender-based discrimination and harassment against minority and female Firefighters, and evidence that the Office of Revenue Sharing seriously considered withdrawing federal funding from the County because of the Department's pervasive discrimination against minorities and women. The County established that the Plan was designed to remedy that past discrimination by encouraging the inclusion of well-qualified African Americans and females within the Department's ranks.

The Fire Department Established That Its Plan Was Narrowly Tailored

In determining whether a plan is narrowly tailored, this Court has suggested that five factors are relevant: "(1) the efficacy of alternative remedies; (2) the planned duration of the remedy; (3) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force; (4) the availability of waiver provisions if the plan could not be met; and (5) the effect of the remedy upon innocent third parties." *United States v. Paradise*, 480 U.S. 149, 187 (1987) (Powell, J., concurring).

The Fire Department established that alternative remedies, such as targeted recruiting, changing the entrance examinations in 1978 so as to eliminate bias in favor of persons who had served as volunteer firefighters, implementing a minority recruitment program in 1974, and hiring a minority recruitment officer, had not worked. The Plan was limited in duration; it was reviewed annually and would terminate once Plan goals were met. The Plan was specifically designed to remedy the existing racial imbalances between the civilian labor force and the Department's workforce, which had resulted from past discrimination. The Plan was flexible, did not impose quotas, and did not require the hiring of any particular number or percentage of minorities or females at any given time. For example, in 1993, the Department hired fewer females than it wished because a suitable number of qualified female applicants could not be found. Finally, the Plan did not have a severe impact on "innocent third parties" because it imposed nothing approaching a complete ban on their hiring. Indeed, the record evidence showed that from 1990 through 1994, of the 72 Firefighters hired, exactly one-half were white males. *Supra* at p. 2. White males were a significant part of the two challenged Firefighter Recruit Classes — the February 1993 Class of 13 Recruits included 4

white males and the June 1994 Class of 7 Recruits included 3 white males. *Supra* at p. 9.

The Court of Appeals Ignored The County's Proof And Struck Down The Plan

The Court of Appeals assumed that the Fire Department Plan was "justified by a compelling interest," accepting the District Court's finding that there was ample evidence of past discrimination and that the Department's interest in redressing the present effects of this documented past discrimination within the Department was a "compelling" interest. The Court of Appeals concluded, however, that the Plan was not narrowly tailored because "the means chosen by the department are not related closely enough to the interests asserted." *Alexander v. Prince George's County, Maryland*, Appendix at p. A-8.

Significantly, the Court of Appeals accepted the District Court's findings, based upon the Department's extensive evidence, that the Plan was limited in duration, was flexible, did not impose quotas, and did not impinge inappropriately upon the rights of non-minorities. Rather, the Court isolated what it found to be two "fatal" flaws in the Plan: (1) it may benefit certain minority groups (Hispanics, Asians, and Native Americans) which had not been established in the record to be the victims of past discrimination; and (2) the Fire Department did not abandon the legislatively mandated "volunteer preference," perceived by the Court of Appeals to be a "less drastic" and a "race-neutral" route than affirmative action to accomplishing its legitimate interests.

These "flaws," if flaws they be, are not "fatal in fact" to the Fire Department's Plan under any fair reading of this Court's prior decisions. Nevertheless, the Court of Appeals has consigned the Fire Department's admirable and long-standing Affirmative Action Plan to the dustbin of history.

The Court of Appeals Erred In Requiring That The Fire Department's Plan Must Benefit Only African Americans and Women

Relying on *Croson*, the Court of Appeals concluded that the "failure to match particular racial or ethnic preferences with particular acts of discrimination against particular racial or ethnic groups" established that the Plan was not narrowly tailored. *Alexander v. Prince George's County, Maryland*, Appendix at p. A-9.

In fact, the record in this case clearly establishes that the central focus of the Fire Department's affirmative action efforts with respect to minorities has been to remedy patently apparent and established past discrimination against African Americans in the Fire Department by increasing the number of African American Firefighters. From 1990 through 1994, of those 72 new Recruits, the Fire Department hired 24 African Americans and 3 other minorities. These statistics leave no doubt that minority hiring, just as the County and the Department intended, equated by any fair analysis to African American hiring.[5]

Despite this, the Court of Appeals found that the fact that a handful of members of non-African-American minority groups may have benefited from the Plan over the years was sufficient to render it unconstitutional. That conclusion is not supported or even suggested by *Croson* or by any other decision of this Court.

---

[5] Further, the Court of Appeals ignored the ample statistical evidence in the record of past discrimination against Hispanics, Asians, and Native Americans and continuing underrepresentation of these minorities among the County's Firefighters. The 1990 Census figures indicate that County's civilian labor force was approximately 3.5% Hispanic, 3.5% Asian, and 0.35% Native American. *Supra* at p. 1. By way of contrast, at the end of fiscal year 1993, the Fire Department was less than 2% Hispanic, 0.5% Asian, and 0.0% Native American. *Supra* at p. 2.

In discussing *Croson*, the Court of Appeals states:

> In that case the Supreme Court expressly said that an affirmative action program may not give benefits to minorities in general, but it must target benefits only to particular groups that were the subject of particular acts of discrimination . . . .

Alexander v. Prince George's County, Maryland, Appendix at p. A-11. What this Court actually said in *Croson* was that "[t]he *random* inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in . . . [a particular private industry in a particular political subdivision] *suggests* that *perhaps* the . . . purpose was not in fact to remedy past discrimination." *Croson*, 488 U.S. at 506 (emphasis supplied). And in *Croson* there was as well, as this Court put it, "gross overinclusiveness." *Id.*

The circumstances giving rise to the adoption of the Plan, and the implementation of that Plan over time, prove beyond dispute that the Plan was for the sole and exclusive purpose of eradicating past discrimination.

The Court of Appeals Erred In Requiring That The County, As a Prerequisite to Implementing An Affirmative Action Plan, Was Required To Waive The Volunteer Preference, Established by Ordinance

As set forth earlier, *supra* at pp. 7-8, the "volunteer preference" is the fifth of eight hiring preferences specified for Firefighters in the County's Personnel Law. It is available to all applicants for employment with the Fire Department, of any race or gender, who have served as volunteer Firefighters. It may be waived by the County Personnel Officer upon a written finding by him that its application with respect to any given Firefighter Recruit Class "will have a disparate effect on a protected class." (Appendix at p. C-7). The "volunteer preference" enables the Department to

hire the best qualified applicants. It is self-evident that experience as a volunteer is likely to be beneficial to a Firefighter Recruit, to the Department, and to the community it serves.

In *Croson*, this Court held that the City of Richmond's Minority Business Enterprise program was not narrowly tailored, in part because the City "does not appear to have [given] any consider[ation] [to] the use of race-neutral means to increase minority participation in . . . contracting" before adopting its race-based measure. This Court reasoned that because minority contracting businesses tend to be smaller and less well-established, providing race-neutral financial and technical assistance to them and relaxing bond requirements might achieve the desired remedial results in public contracting — increasing opportunities for those minority businesses. 488 U.S. at 507, 510.

In *Croson*, the Court did not specify the lengths to which governments must go in considering race-neutral measures before resorting to race-conscious action. An appeals court faced with this issue concluded that the government need not first exhaust race-neutral alternatives, but only give them serious attention. *See Coral Constr. Co. v. King County, Washington*, 941 F.2d 910, 923 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992) ("while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every such possible alternative.").

The Fire Department not only "considered", but as set forth earlier (*supra* at p. 14) actually implemented before 1984, a number of race-neutral strategies and options. These included extensive minority recruiting efforts and complete test modifications. Only after these efforts failed did the Department implement its Affirmative Action Plan. Surely this Court's precedent does not require the Fire Department to have pursued every imaginable strategy, including those not likely to be successful, in order to establish, at length, more than ten years later, that its Plan is narrowly tailored.

Additionally, the Court of Appeals' gratuitous post-hoc finding that the "volunteer preference" should have been waived and rendered inoperative by the County Personnel Officer, is based upon an inaccurate reading of the Code and the invalid premise that only white men have "volunteer preference" and that the advantage thus given to whites is being offset by the advantage given to minorities through the Affirmative Action Plan.

Now, and increasingly so since 1984, persons of all races are knowledgeable and experienced volunteer Firefighters. For example, 7 of the 13 Recruits hired in the 1993 Class received "volunteer preference." Of those 7, 2 were minority males, 3 were white males, and 2 were white females. In the 1994 Recruit Class, 2 Recruits received "volunteer preference" — a minority male and Respondent Angela Moore, who is of course a white female. *Supra* at p. 9.

The "volunteer preference," as it should, gives a legitimate advantage to persons who have served as volunteers. Part of the governmental reason for the "volunteer preference" is to encourage persons to volunteer. It is the view of Prince George's County that the elimination, either prospective or retrospective, of the "volunteer preference" would have no appreciable impact on the racial composition of the Fire Department workforce. Although the Court of Appeals characterized the elimination of the "volunteer preference" as a "simple step" (Appendix at p. A-8), it is not one that should have been taken or would have assisted in increasing diversity in the workforce.

The Court of Appeals Erred in Analogizing This Case to Prior Fourth Circuit Cases Which Are Totally Dissimilar

The Court of Appeals supports its conclusion that the Fire Department's Affirmative Action Plan is not narrowly tailored by reference to *Podberesky v. Kirwan*, 956 F.2d 52

(4th Cir. 1992)[6]; *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207 (4th Cir. 1993), and *Maryland State Troopers Ass'n, Inc. v. Evans*, 993 F.2d 1072 (4th Cir. 1993). *Alexander v. Prince George's County, Maryland*, Appendix at pp. A-11 through A-12. These cases lend no support to the Court's conclusions in the case at bar. *Podberesky* was a case involving the complete exclusion from consideration of whites from a public university's scholarship program. There is no exclusion of whites, or anything close to it, in the case at bar. And both *Hayes* and *Evans* are cases involving affirmative action in promotion where, as those cases make clear, the legal standards are vastly different from those in hiring cases.

The Court of Appeals Erred When It Struck Down The Entire Plan, Including Both Its Race and Gender Components

The Fire Department Plan is designed to give an appropriate preference to both minorities *and* females. The Court of Appeals analyzed the Plan only under the strict scrutiny standard and struck down the entire Plan, including both its race- and gender-based aspects. It is established law that gender-based preferences are to be subjected only to intermediate, not strict scrutiny. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). This Court recently clarified that gender-based "official action that closes a door or denies opportunity" is subjected to a "heightened review," not "equat[ed] . . . for all purposes" to the standard of judicial scrutiny given to race- or national origin-based classifications. *United States v. Virginia*, 135 L.Ed 2d at 751 & n.6.

---

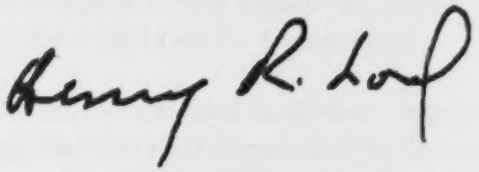
[6] The case was remanded to the District Court for fact finding to establish the required compelling interest and eventually was appealed again to the United States Court of Appeals for the Fourth Circuit. *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 2001, 131 L.Ed 2d 1002, 63 U.S.L.W. 3831 (1995).

To withstand this "heightened review," a government classification must be supported by an exceedingly persuasive justification," must serve "important governmental objectives," and must be "substantially related to the achievement of those objectives." *Id.* at 750-51 (*quoting Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). The gender preferences in the Fire Department's Affirmative Action Plan are without question justified by compelling governmental interests in remedying scurrilous past discrimination and harassment against women and ensuring diversity in the workplace. Indeed, of the 72 Recruits hired from 1990 through 1994, 11 were women, one of whom was Respondent Angela Moore. *Supra* at p. 2.

CONCLUSION

Prince George's County, Maryland and its Fire Department officials respectfully request that this Honorable Court grant a Writ of Certiorari so as to clarify the effect of strict scrutiny upon governmental affirmative action plans for public-safety hiring. Further, Petitioners respectfully request that this Honorable Court declare that the decision of the United States Court of Appeals for the Fourth Circuit, concluding that the 1984 Affirmative Action Plan of the Prince George's County Fire Department was unconstitutional, is not in conformity with the applicable rulings of this Court.

Respectfully submitted,



BARBARA L. HOLTZ
Acting County Attorney
SEAN D. WALLACE
Deputy County Attorney
Prince George's County,
Maryland
14741 Governor Oden
Bowie Drive
Upper Marlboro, MD 20772
(301) 952-5237

HENRY R. LORD*
LEONARD E. COHEN
ANN L. LAMDIN
Piper & Marbury L.L.P.
36 South Charles Street
Baltimore, MD 21201
(410) 539-2530
* *Counsel of Record*

December 4, 1996

Attorneys for Petitioners

TABLE OF CONTENTS
APPENDIX

	PAGES
OPINION, UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, HONORABLE M. BLANE MICHAEL, JOINED BY HONORABLE J. HARVIE WILKINSON, CHIEF JUDGE, AND HONORABLE JOHN A. MACKENZIE, SENIOR DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA, SITTING BY DESIGNATION, SEPTEMBER 5, 1996	A-1 to A-12
OPINION AND ORDER, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, SOUTHERN DIVISION, HONORABLE ALEXANDER WILLIAMS, JR., OCTOBER 11, 1995	B-1 to B-20
CONSTITUTIONAL, STATUTORY AND MISCELLANEOUS PROVISIONS	C-1 to C-10
CONSTITUTIONAL PROVISIONS—FEDERAL AND STATE	
United States Constitution, Article III ...	C-1
United States Constitution, Amendment XIV, Section 1	C-2
Constitution of Maryland, Article XI-A, Sections 1, 3	C-2
STATUTES—FEDERAL	
42 U.S.C. §1981 (1870)	C-3
42 U.S.C. §1983 (1871)	C-3

TABLE OF CONTENTS
APPENDIX

PAGES

STATUTES AND ORDINANCES—STATE AND COUNTY

Maryland Annotated Code, Art. 25A, Section 5(A)(1) C-4

Prince George's County Code, Section 16-109 (1976) C-4

Prince George's County Code, Section 16-162 (1976, 1981) C-5

MISCELLANEOUS

Charter of Prince George's County, Maryland (1970, as amended), Article V C-7

The Prince George's County Government, Order of County Executive No. 15-1983, April 6, 1983 .. C-8

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MARC ALEXANDER;
TIMOTHY CLARK;
GEORGE FRYE;
ROBERT A. MOORE;
ANGELA MOORE;
RICHARD SAXBERG;
JOSH DAVID REEDY,
Plaintiffs-Appellants,
v.
M.H. ESTEPP, individually and in his capacity as Fire Chief;
YVONNE TYLER, individually and in her official capacity;
PRINCE GEORGE'S COUNTY;
MAUREEN HENNESSY, individually and in her official capacity;
WILLIAM H. GODDARD, individually and in his official capacity,
Defendants-Appellees.

No. 95-2978

Appeal from the United States District Court
for the District of Maryland, at Greenbelt,
Alexander Williams, Jr., District Judge.
(CA-93-2636-AW, CA-94-2090-AW)

Argued: June 5, 1996

Decided: September 5, 1996

Before WILKINSON, Chief Judge, MICHAEL, Circuit Judge, and MACKENZIE, Senior United States District

Judge for the Eastern District of Virginia, sitting by designation.

Affirmed in part, reversed in part, and remanded by published opinion. Judge Michael wrote the opinion, in which Chief Judge Wilkinson and Senior Judge MacKenzie joined.

COUNSEL

ARGUED: Daniel F. Goldstein, BROWN, GOLDSTEIN & LEVY, Baltimore, Maryland, for Appellants, Henry Robbins Lord, PIPER & MARBURY, L.L.P., Baltimore, Maryland, for Appellees. ON BRIEF: Joseph B. Espo, Lauren E. Willis, BROWN, GOLDSTEIN & LEVY, Baltimore, Maryland, for Appellants, Leonard E. Cohen, Ann L. Lamdin, PIPER & MARBURY, L.L.P., Baltimore, Maryland; Barbara L. Holtz, Acting County Attorney, Sean D. Wallace, Deputy County Attorney, PRINCE GEORGE'S COUNTY, MARYLAND OFFICE OF LAW, Upper Marlboro, Maryland, for Appellees.

OPINION

MICHAEL, Circuit Judge:

The plaintiffs are six white men and one white woman who sought employment as Prince George's County, Maryland, firefighters in 1993 and 1994. They sued fire department officials and the county under 42 U.S.C. §§ 1981 & 1983, alleging that the department's affirmative action program impermissibly discriminates on the basis of race and

sex, in violation of the Equal Protection Clause of the Fourteenth Amendment.[1] The District Court granted the defendants' motion for summary judgment and denied the plaintiffs' cross-motion for summary judgment.

We affirm in part the judgment of the district court, and we reverse in part. We hold that (1) the department's affirmative action program is invalid because it is not narrowly tailored to achieve its goals, (2) further proceedings are necessary to determine whether plaintiff Josh Reedy would have been hired but for the existence of the program, (3) the other plaintiffs were not denied employment because of their race or sex, and (4) the individual defendants have not established that they are entitled to qualified immunity.

I.

Prince George's County chooses its firefighters in the following manner. Applicants must take a pass/fail performance examination and a written examination. Those who pass both are interviewed. Each applicant is scored based on his or her performance on the written examination and in the interview. The department then groups the applicants into three "bands"—"Outstanding," "Well Qualified," or "Qualified"—based on their combined scores. Within each band, applicants are ranked based on their "preference level." A county ordinance requires that within the same

---

[1] The individual defendants and their positions and roles are as follows: M.H. (Jim) Estepp is the county's fire chief. Maureen Hennessey was an officer in the fire department's Administrative Services Division of the Management Services Command and played a key role in hiring new recruits. William F. Goddard, III, was the lieutenant colonel in charge of the Management Services Command and also played a key role in hiring. Yvonne R. Tyler, a civilian employee of the fire department is the administrative assistant in charge of personnel and is the recruitment and examination board administrator.

band (Outstanding, Well Qualified, or Qualified), firefighter applicants are to be hired in the following order:

(1) Current county employees seeking promotions;

(2) Disabled military veterans;

(3) Non-disabled veterans who were volunteer firefighters;

(4) All other non-disabled veterans;

(5) All other former volunteer firefighters;

(6) Displaced homemakers not in any of the above categories;

(7) County residents not in any of the above categories;

(8) All other persons.

Prince George's County Code § 16-162(d)(2)(i). The preferences for volunteer firefighters ((3) & (5)), however, may be eliminated if the county's personnel officer certifies in writing to the fire chief that continued use of the preference "will have a disparate impact on a protected class as defined by the guidelines of the Equal Employment Opportunity Commission." Prince George's County Code § 16-162(d)(4). Applicants within the same band who have the same preference level are ranked on the basis of their combined examination and interview scores. The department maintains a list of the applicants and their total rank (based on band, preference, and score). This list is called the "Applicant Register," and it is continually updated as new applicants apply and existing applicants withdraw their applications.[2]

---

[2] The district court correctly held that the Applicant Register was not inadmissable hearsay. The Applicant Register "set [ ] forth [ ] the activities of" the fire department, namely, the ranking of applicants for employment. Fed. R. Evid. 803(8)(A).

The mechanics of the department's affirmative action program have never been committed to writing, but the record indicates that the program works in the following manner. Each recruiting season fire department officials set informal caps on the number of whites and the number of males who will be offered employment.[3] The department offers applicants employment in the order in which they are listed on the Applicant Register, but once a cap is reached (either for whites or for males), a lower ranking, uncapped applicant is offered employment instead of a higher ranking, capped applicant.

The informal caps are imposed in an effort to meet affirmative action goals set (in percentages) by the county. In the past the county's goals have tracked Census data. In 1993 and 1994 the county set goals of having 18 percent of its workers female and 39 percent non-white or Hispanic. Currently, 16 percent of county protective services personnel (firefighters and paramedics) are female and 38 percent are non-white or Hispanic. County officials have said that they expect to increase the affirmative action percentage goals in order to track new Census data expected to show increases in the county's minority population and in the percentage of female participation in the workforce.

The plaintiffs complain specifically about the 1993 and 1994 hiring seasons. In 1993 the department offered employment to thirteen applicants. According to the Applicant Register, none of the plaintiffs ranked better than fourteenth in that hiring season. In 1994 the department offered employment to nine applicants. Plaintiffs Marc Alexander and

---

[3] The parties dispute what these "caps" should be called. The plaintiffs have described them as quotas; the defendants call them flexible goals. We believe the term "informal caps" is the most appropriate description.

Angela Moore received and accepted offers.[4] Five other applicants accepted offers of employment. Plaintiff Josh Reedy ranked eighth on the Applicant Register, but the department did not offer him a job. The remaining plaintiffs ranked lower than ninth.

The plaintiffs sued seeking injunctive, declaratory, and monetary relief. The district court rejected all of their claims and entered summary judgment in favor of the defendants.[5]

II.

We believe that the department's affirmative action program, as it is currently structured, cannot pass constitutional scrutiny, even though "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand,* 115 S. Ct. at 2117.

All racial classifications—even those intended to benefit minority groups—are subject to strict scrutiny. *Id.* at 2111 (racial classifications are "inherently suspect" and receive "a

---

[4] Moore received an offer because of the existence of the affirmative action program.

[5] The district court held as a preliminary matter that all the plaintiffs had standing, including those who would not have been hired even in the absence of the department's affirmative action program. We affirm this ruling. "The injury in cases of this kind is that a 'discriminatory classification prevent[s] the plaintiff from competing on an equal footing.' The aggrieved party 'need not establish that he would have obtained the benefit but for the barrier in order to establish standing.' " *Adarand Constructors, Inc. v. Pena,* 115 S. Ct. 2097, 2105 (1995) quoting *General Contractors v. Jacksonville,* 113 S. Ct. 2297, 2303-04 (1993)) (internal citation omitted, modification in original). Standing is proper even where a program "establishes 'goals' rather than rigid 'quotas.' " *Bras v. California Publ. Utils. Comm'n,* 59 F.3d 869, 875 (9th Cir. 1995), *cert. denied,* 116 S. Ct. 800 (1996); *accord Omnipoint Corp. v. FCC,* 78 F.3d 620, 628 (D.C. Cir. 1996).

most searching examination") (citations omitted); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Adarand*, 115 S. Ct. at 2113 (quoting *Fullilove v. Klutznik*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)). An affirmative action program may be upheld only if it is narrowly tailored to serve a compelling governmental interest. *Id.*

The county argues that its program is intended to benefit African Americans and women by serving, among others, the following goals: (1) redressing present effects of past and current incidents of discrimination and harassment within the department, (2) sending a message that the department respects diversity and that discrimination and harassment will not be tolerated, (3) promoting more effective fire prevention and firefighting by fostering the trust of a diverse public, and (4) serving educational goals by providing children with racially and sexually diverse role models. The district court found that the first interest asserted was compelling. The court relied on (1) "extensive statistical evidence of discrimination" against African Americans and women, (2) evidence that discriminatory behavior and attitudes within volunteer fire departments carried over into the county fire department,[6] and (3) anecdotal evidence of harassment of African American and female members of the

[6] According to the defendants, at one time all volunteer fire departments but one, Chapel Oaks, excluded African Americans from membership. Even though volunteer departments no longer formally exclude African Americans, the County claims that an atmosphere of racial intolerance still pervades many volunteer departments, making African Americans feel unwelcome and less likely to join. In addition, many women have reported that they were sexually harassed while they were members of volunteer departments and that male members of the departments made it known that women were not welcome. African Americans and women were not allowed to ride fire trucks in some volunteer departments, for example, and were subject to hazing and offensive epithets.

county fire department. The plaintiffs challenge these findings, primarily on the grounds that most acts of harassment and discrimination occurred long ago and that there is no present evidence of racial or sexual animus within the Prince George's County fire department. We need not resolve this dispute because even assuming, *arguendo,* that the asserted interests are compelling, the program is not narrowly tailored because the means chosen by the department are not related closely enough to the interests asserted.

The program is not narrowly tailored because means less drastic than outright racial classification were available to department officials. In particular, the Prince George's County Code expressly provides that the fire department may eliminate its volunteer preference in order to encourage diversity within the department. The department did not, however, take that simple step. Indeed, if discriminatory attitudes within the county fire department owe their origin to practices within volunteer fire departments, as the defendants claim, then the most logical solution is to deny volunteer firefighters the hiring preference they currently enjoy. If a governmental body finds itself linked to a private entity that discriminates, the government should sever its ties to the discriminating entity before resorting to reliance on a suspect classification. "[E]xplicit racial preferences, if available at all, must be only a 'last resort' option." *Hayes v. North State Law Enforcement Officers Ass'n,* 10 F.3d 207, 217 (4th Cir. 1993); *see also United States v. Paradise,* 480 U.S. 149, 171 (1987) (plurality opinion); *In re Birmingham Reverse Discrimination Employment Litig.,* 20 F.3d 1525, 1546-47 (11th Cir. 1994), *cert. denied,* 115 S. Ct. 1695 (1995).

Another defect in the program is its tendency to benefit particular minority groups that have not been shown to have suffered invidious discrimination. The county claims that past pervasive discrimination against African Americans requires it to maintain its affirmative action program. The current program, however, treats all minority groups alike,

even though the county has presented evidence only of discrimination against African Americans. The department has, for example, passed over white applicants in favor of Hispanics and South Asians, but there is no record evidence of discrimination against Hispanics or South Asians. This failure to match particular racial or ethnic preferences with particular acts of discrimination against particular racial or ethnic groups also shows that the program as currently structured is not narrowly tailored. *J.A. Croson*, 488 U.S. at 506; *accord id.* at 510-11 (O'Connor, J., concurring).[7]

III.

A.

None of the plaintiffs (except for Reedy, whose case we discuss below) ranked high enough on the Applicant Register to have been offered a job even in the absence of the fire department's affirmative action program. Because the existence of the affirmative action program did not cause them to be denied employment opportunity, the plaintiffs (except Reedy) may not be awarded any personal relief. *See St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2752 (1993); *Jiminez v. Mary Washington College*, 57 F.3d 369, 377-78 (4th Cir.), *cert denied*, 116 S. Ct. 380 (1995); *Zatler v. Wainwright*, 802 F.2d 397, 401 (11th Cir. 1986) (per curiam).

---

[7] We also note that no written fire department document describes the mechanics of the program's operation. Because the program here is unwritten, judicial examination of its provisions is more difficult, lending support to our finding that the program is not narrowly tailored. *Cf. White v. Roughton*, 530 F.2d 750, 754 (7th Cir. 1976) (per curiam) ("[f]air and consistent application of [ ] requirements requires that [ ] [ ] written standards and regulations" be established); *Baker-Chaput v. Cammett*, 406 F. Supp. 1134, 1140 (D.N.H. 1976) ("the establishment of written, objective, and ascertainable standards is an elementary and intrinsic part of due process").

The plaintiffs argue that their rank on the Applicant Register is suspect due to department officials' discriminatory method of administering and scoring exams and interviews. The district court rejected this claim, as do we. We have conducted a de novo review of the record evidence, and we agree with the district court that the plaintiffs have not forecast sufficient evidence showing "that the Department 'played with the process' to ensure the hiring of minority applicants." Dist. Ct. Op., at 7 [Appendix at p. B-8]. We affirm the denial of personal relief to all the plaintiffs (except Reedy) for the reasons stated in the district court's opinion. *Id.* at 7-9 [Appendix at pp. B-7 through B-8].

B.

Reedy's case is different. He ranked eighth on the Applicant Register in a recruiting season when the department made nine offers. Three of those offers went to affirmative action candidates ranked lower than he. Thus it appears that Reedy would have received an offer of employment in the absence of the affirmative action program and that therefore he should be considered for relief. The defendants claim, however, that Reedy was not offered a job because other applicants refused their offers too close to the beginning of the department's training period for a job offer to have been made to Reedy. The district court should have addressed the factual issue of whether Reedy would have been offered employment in the absence of the department's affirmative action program.[8] We therefore remand Reedy's personal claim to the district court for a new determination of whether he is personally entitled to relief.

---

[8] According to the district court, Reedy was not hired because three white males ranked higher than he did. Dist. Ct. Op., at 6 [Appendix at p. B-5]. However, because the program is invalid, this comparison is not relevant; Reedy must be compared to all applicants, regardless of their sex or race.

IV.

The district court also held that the individual defendants were entitled to qualified immunity. We disagree.

Government officials performing discretionary functions are immune from civil liability unless "in the light of pre-existing law the unlawfulness [of their conduct is] apparent." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). The plaintiffs may overcome this qualified immunity only if they can demonstrate that the defendants' conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Thus the question is whether the individual defendants should have known in 1993 and 1994 that the fire department's affirmative action program was unconstitutional.

In 1989 the Supreme Court's decision in *J.A. Croson* (affirming our 1987 decision striking down an affirmative action program, *see* 822 F.2d 1355) should have put all reasonable administrators of local affirmative action programs on notice that their programs would be subject to strict scrutiny. In that case the Supreme Court expressly said that an affirmative action program may not give benefits to minorities in general, but it must target benefits only to particular groups that were the subject of particular acts of discrimination: "The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination" in the particular field and in the particular location "suggests that perhaps the [defendant's] purpose was not in fact to remedy past discrimination." *J.A. Croson,* 488 U.S. at 506. Furthermore, in *Podberesky v. Kirwan,* 956 F.2d 52 (4th Cir. 1992), we reaffirmed the importance of maintaining a close nexus between the remedy and the discrimination the remedy is intended to correct. Fire department officials at least should have re-evaluated the mechanics of and need for their affirmative action program at that time. Also, by the time of the 1994 hiring season, a reasonable official would have been aware of two of our opinions, *Hayes* (1993), *supra,*

and *Maryland Troopers Ass'n, Inc. v. Evans,* 993 F.2d 1072 (4th Cir. 1993), in which we held state affirmative action programs invalid because they were not narrowly tailored to serve compelling state interests. Thus, we believe that the individual defendants have not established their entitlement to qualified immunity because case law (about which a reasonable official would have known) had clearly established by 1993 and 1994 that the department's affirmative action program failed to satisfy the strict requirements of the Equal Protection Clause.

V.

The judgment of the district court is affirmed in part and reversed in part. The case is remanded for fashioning of appropriate injunctive and declaratory relief, for consideration of whether plaintiff Reedy was denied an offer of employment because of his race or sex, and for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARC ALEXANDER, *et al.*, *Plaintiffs,* v. PRINCE GEORGE'S COUNTY, MARYLAND, *et al.*, *Defendants.*	CIVIL NO. AW-93-2636 Consolidated with CIVIL NO. AW-94-2090

MEMORANDUM OPINION

(Filed October 11, 1995)

The Plaintiffs commenced this case by challenging the Prince George's County Fire Department's ("County" or "Department") decision not to hire them as firefighters. They contend that they would have been hired if not for the Department's affirmative action plan (the "Plan"). They maintain that the Plan is unconstitutional and have brought this action under 42 U.S.C. § § 1981 and 1983 seeking damages and injunctive relief.

Presently before the Court is the Defendants' motion for summary judgment. The Plaintiffs have filed a cross-motion for partial summary judgment. The Court has held a hearing in this matter and closely reviewed the memoranda

and exhibits filed by the parties.[1] For the reasons that follow, the Court will grant the Defendants' motion.

I. *Factual Background*

The relevant facts in this case are undisputed. The Plaintiffs are six white males and one white female. Plaintiffs Marc Alexander, Timothy Clark, George Frye, Robert Moore, Angela Moore, and Richard Saxberg applied for firefighter positions with the Department in 1993. The Department hired thirteen individuals in that class of firefighters, but it did not hire any of the Plaintiffs. Mr. Alexander, Mr. Frye, and Ms. Moore applied for firefighter positions again in 1994, however, Mr. Clark, Mr. Moore, and Mr. Saxberg did not. In that same year, Plaintiff Josh Reedy applied to the Department for the first time. The Department hired Mr. Alexander and Ms. Moore in 1994; it did not offer positions to Mr. Frye and Mr. Reedy.

The Plaintiffs have brought this suit against Prince George's County, Maryland. The Second Amended Complaint also names as Defendants M.H. Estepp, William Goddard, III, Maureen Hennessy, and Yvonne Tyler. These individuals are officers of the Department, and the Plaintiffs claims against them are in both their individual and official capacities.

A. *The Hiring Process*

Since 1984, the Department has used the same procedure to hire firefighters. Applicants are first given a written examination. Those applicants that score 60% or higher on the exam are then orally interviewed. Hennessy Dep. I at 43. Applicants are then placed on the Applicant Register based on their combined score on the written exam (60%) and oral

---

[1] The docket sheet lists as pending the Defendants' motion for summary judgement filed in August of 1994 (Paper No. 39) and the Plaintiffs' motion to compel filed that same month (Paper No. 51). Counsel indicated that these matters were moot, and the Court denied them as moot at the hearing.

interview (40%). Paper No. 65, Ex. 4—Response to Interrogatory 13.

The Applicant Register is then divided into three categories or bands—Outstanding, Well-Qualified, and Qualified. The band ranges for the 1993 and 1994 applicants were:

Outstanding—95.50-100.00
Well-Qualified—75.00-95.49
Qualified—60.00—74.99

Paper No. 65, Ex. 5—Response to Interrogatory 12. Within each band, applicants are listed in order based on the preference, if any, to which they are entitled to under County law. The preferences are:

1. P. G. Employees seeking promotions
2. disabled veterans
3. volunteer firefighters who are also veterans
4. veterans who are not disabled
5. volunteer firefighters who are not veterans
6. displaced homemakers who are not veterans
7. P.G. County residents
8. all other persons

Applicants within the same band with the same preference are listed in order based on their combined test scores. Paper No. 65, Ex. 4—Response to Interrogatory 13. All applicants within a given band are considered equally qualified for hire. Knapp Dep. at 26.

Selections are made first from the Outstanding band. If that band is exhausted, selections are made from the Well-Qualified band. The Department has never hired a firefighter from the Qualified band. Goddard Aff. I at ¶ 5.

As part of its hiring process, the Department utilizes its Plan. Based on the County's population, the Plan simply provides goals for the hiring of female and minority candidates; it does not mandate the hiring of unqualified persons. Paper 65, Exs. 11 and 12. For example, if there are not enough qualified minority or female candidates, the goals are

lowered appropriately. Goddard Aff. I at ¶ 6. The Plan, then, does not require the hiring of a certain number of females or minorities.

Again, the focus of this suit is the County's hiring in 1993 and 1994. The Department hired thirteen individuals in its 1993 class of firefighters. The 1994 class had seven members (though it wanted to hire eight) including Mr. Alexander and Ms. Moore.

B. *The Individual Plaintiffs*

1. *George Frye*

Mr. Frye's combined score was 77.80. This score placed him in the Well-Qualified band with a preference as a "volunteer firefighter." He was number 26 on the February 1993 Applicant Register. The four white males hired that year each were taken from the Outstanding band. Goddard Aff. I at ¶ 7. Mr. Frye remained at 26 on the June 1994 Applicant Register. The three white males hired that year were from the Outstanding band or were in the Well-Qualified band and had a higher preference than he did. Goddard Aff. II at ¶ 4.

2. *Marc Alexander*

Mr. Alexander's combined score was 94.6, placing him in the Well-Qualified band with a volunteer preference. He was number 14 on the register. Like Mr. Frye, he was not hired in the February 1993 class. Goddard Aff. I at ¶ 9.

A mathematical error in scoring his written exam was later discovered. Accordingly, his June 1994 combined score was 93.4, placing him once again in the Well-Qualified band. He now had the highest preference because of his employment with the County as a paramedic. He was hired in this class of firefighters. Goddard Aff. II at ¶ 5.

3. *Richard Saxberg*

Mr. Saxberg's combined score of 79.09 placed him in the Well-Qualified band. He was approximately number 164 on

the February 1993 register and was not hired. Goddard Aff. at ¶ 9. He was not included in the June 1994 register as he did not maintain his eligibility for hire. Goddard Aff. II at ¶ 6.

4. *Angela Moore*

Ms. Moore's combined score of 83.32 placed her in the Well-Qualified band in 1993. She also had a volunteer preference. However, she was not hired then as the four females in that class had higher scores and preferences. Goddard Aff. I at ¶ 20. Her score remained the same and she was hired in 1994 in accordance with the Department's goals of hiring qualified applicants. Goddard Aff. II at ¶ 7. It should be noted that Ms. Moore challenges the Plan only so far as it applies to race.

5. *Robert Moore*

Mr. Moore's combined score was 73.90. This score placed him in the Qualified band with no preference in 1993. Goddard Aff. I at ¶ 11. As noted above, the Department has never needed to hire anyone from this band. He did not maintain eligibility for the 1994 class. Goddard Aff. II at ¶ 8.

6. *Timothy Clark*

Mr. Clark's combined score was 66.84, placing him in the Qualified band in 1993. He was not included in that class (Goddard Aff. I at ¶ 12) and did not maintain his eligibility for the 1994 class (Goddard Aff. II at ¶ 9).

7. *Josh Reedy*

Mr. Reedy only applied for the Department's 1994 class. His combined score of 81.48 place him in the Well-Qualified band. He was not hired in that class as the three white males hired either were in the outstanding band or had a higher preference than he did. Goddard Aff. II at ¶ 10.

II. *Summary Judgment Principles*

Summary judgment is appropriate when there is no genuine dispute of material fact and when the moving party

is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986) (citations omitted). See also *Bland v. Norfolk and Southern Railroad Co.,* 406 F.2d 863, 866 (4th Cir. 1969).

In determining whether genuine and material factual disputes exist, resolution of which requires trial, the Court has reviewed the parties' respective memoranda and the many exhibits attached thereto, construing all facts, and all reasonable inferences drawn therefrom, in the light most favorable to the Plaintiffs. *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). Applying these principles to the record in this case, the Court concludes that summary judgment for the Defendants must be granted.

III. *Discussion*

Before addressing the merits of the Plan, the Court must first address several other issues raised by the parties. The Court will address each of these issues in turn.

A. *Plaintiff's Claims of Inappropriate Practices*

The Plaintiffs first contend that the Department "played with the process" to ensure the hiring of minority applicants. Paper No. 67 at 16-18. Specifically, they allege that they were each "harmed by one or more of the following practices:

(a) altering of test scores;

(b) discriminatory application of the time between permitted retests;

(c) alteration of oral interview scores;

(d) discriminatory method of granting volunteer firefighter status;

(e) the discriminatory setting of employment bands; and

(f) the illegal use of race and gender preferences in offering employment."

Second Amended Complaint at ¶ 59 and 69.

The Plaintiffs do not have sufficient evidence to withstand the Defendants' motion for summary judgment on these claims. For example, the Defendants specifically deny altering written test scores. Goddard Aff. I at ¶ 13. All but two of the Plaintiffs conceded that they have no reason to think that their test scores were altered. *See* Saxberg Dep. at 35; R. Moore Dep. at 21-22; Frye Dep. at 23-24; Reedy Dep. at 67; A. Moore Dep. at 21-22. Moreover, Mr. Alexander has not demonstrated any harm from a scoring error that resulted in raising his test score and that wasn't discovered until after the February 1993 class was hired. Alexander Dep. at 16-20; Goddard Aff. I at ¶ 8. Additionally, Mr. Clark has only stated that, after reviewing his exam, "a lot of the answers did not seem like the answers I put on the paper." Clark Dep. at 8. Such speculation is insufficient to withstand the motion for summary judgment. Fed. R. Civ. P. 56(e); *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1129-30 (4th Cir. 1987).

The Plaintiffs also fail to present sufficient evidence in support of their allegations of lowering oral interview scores. Again, most of the Plaintiffs admit that they have no reason to think that the Defendants altered their scores. *See* Saxberg Dep. at 36; R. Moore Dep. at 21-22; Frye Dep. at 24; Reedy Dep. at 67-68; A. Moore Dep. at 21-22; Alexander Dep. at 16. The Plaintiffs rely on irrelevant evidence—the alleged altering of an applicant's score who is not a plaintiff (Paper No. 67 at 17) and speculation—a personal belief that the Department officials were more helpful to minority applicants (Paper No. 67 at 18). Again, such evidence is insufficient. *Felty*, 818 F.2d at 1129-30.

Plaintiff Timothy Clark does allege that his interview score was altered based on a statement from Lt. Brian Larman to Mr. Clark's mother. Lt. Larman allegedly told her that he gave Mr. Clark a 100 and that the other two examiners scored him 100 and 95. Clark Dep. at 6. Lt. Larman denies making such a statement (Larman Dep. at 4-5; 47) and Clark's actual score was 63.61 (Goddard Aff. I at 12). Moreover, taking this alleged statement as true, there is still no evidence that Mr. Clark's score was altered *because* of his race or gender. Furthermore, assuming his oral interview score was 100, he still would not have been selected. Goddard Aff. I at ¶ 12. Therefore, summary judgment on this claim must be for the Defendants.

Finally, there is no evidence to support the Plaintiff's other claims of "playing with the process." There is no evidence that the Defendants denied white males the opportunity to retest or granted volunteer preferences on the basis of race. The Defendants specifically deny having such policies. Goddard Aff. I at ¶ 14, 16. There is also no evidence that the Plaintiffs were harmed by the setting of the employment bands. Accordingly, summary judgment must be for the Defendants on these claims.

B. *Standing*

To pursue this action, the Plaintiffs must first demonstrate that the challenged policy has caused them an actual injury that can be redressed through judicial action. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (citations omitted). This requirement of standing insures that litigants have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of the issues upon which the court so largely depends . . ." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

The Defendants argue that only Plaintiff Reedy has standing to pursue this suit. It is undisputed that only thirteen applicants were hired for 1993, and that only seven were hired in 1994. It is also undisputed that none of the Plaintiffs ranked in the top thirteen on the Applicant Register for 1993. For 1994, Plaintiffs Reedy and Alexander were ranked in the top eight on the Applicant Register, and Alexander was in fact selected. Thus, the Defendants argue that because they would not have been hired even if there was no affirmative action plan, the Plaintiffs other than Reedy lack standing. See, *e.g.*, *Bertoncini v. City of Providence*, 767 F. Supp. 1194, 1197-99 (D.R.I. 1991) (only plaintiffs ranked 60th or higher on eligibility list demonstrated irreparable harm necessary for injunctive relief when only 60 openings available).

The Court is not persuaded by this argument. In cases under the Fourteenth Amendment, "the denial of equal treatment resulting from the imposition of the barrier" is the injury for standing purposes. *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 113 S. Ct. 2297, 2303 (1993). *See also Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 280-81 n. 14. The Defendants maintain that this rule does not apply as the Plan only provides preferences, not strict set asides. However, the Court does not read the rule so narrowly. Here, the alleged injury is that the Plan is a "barrier that either created a discriminatory obstacle or had the effect of producing unequal access" to employment with the Department. *Hopwood v. State of Texas*, 861 F. Supp. 551, 569 (W.D. Tex. 1994) (unsuccessful applicants have standing to challenge law school's affirmative action program although it only provided for preferences). Therefore, the Court finds that the Plaintiffs each have standing in this case.

C. *1993 Applicant Register*

The Court will consider the 1993 Applicant Register (Paper No. 65, Ex. 1) despite the Plaintiffs' objections. The Plaintiffs contend that the document, which is simply a list

of the applicants for firefighter positions in 1993, is hearsay. However, the applicant register is continually updated as part of the hiring process. Goddard Aff. III at 5. The Defendants created the 1993 Applicant Register by reinserting the names of those that for one reason or another dropped off the list so that a comprehensive list is available. Thus, it is a business record that would be admissible at trial under Fed. R. Evid. 803(6)(8).

D. *Authority to Adopt the Plan*

The Plaintiffs argue, in part, that the Department did not have authority to adopt the Plan. Without such authority, the Plan cannot stand. *See, e.g., Concrete General v. Wash. Suburban Sanitary Com'n.*, 779 F. Supp. 370 (D. Md. 1991).

The Court finds that the Department had authority to adopt its Plan. It is undisputed that the P.G. County Council required the County Executive to establish an affirmative action plan by executive order. P.G. County Code, §16-109(b) (Paper No. 65, Ex. 9). The County Executive issued an Order pursuant to the Council's instruction, and the Plan continues under this Order (Paper 65, Ex. 11). Finally, "formal findings of discrimination need neither precede nor accompany the adoption of affirmative action." *Ensley Branch, N.A.A.C.P. v. Siebels*, 31 F. 3d 1548, 1565 (11th Cir. 1994) (citations omitted). Accordingly, the Court finds that the Department had authority to adopt the Plan.

E. *Strict Scrutiny*

It is well-settled that classifications based on race must be evaluated under the strict scrutiny standard.[2] *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); *Hayes*

---

[2] The Plaintiffs brought this action pursuant to 42 U.S.C. § 1981 and 1983. Because the Court finds that the Plan survives scrutiny under Section 1983, it necessarily survives Section 1981 analysis. *See Stuart v. Roche*, 951 F. 2d 446, 455 (1st Cir. 1991), cert. denied, 504 U.S. 913 (1992).

v. North State Law Enforcement Officers Ass'n., 10 F. 3d 207, 212 (4th Cir. 1993). Under this standard, the classification must be based on a "compelling interest" and the affirmative action plan must be "narrowly tailored." *Hayes*, 10 F. 3d at 212 (citations omitted). The Supreme Court has recently reminded us that application of strict scrutiny should not be considered fatal to affirmative action plans.[3] *Adarand Constructors, Inc. v. Pena*, _____ U.S. _____, 63 U.S.L.W. 4523, 4533 (1995) (citations omitted).

1. *Compelling Interest*—To show a compelling interest, the County must show more than general societal discrimination. *Croson*, 488 U.S. at 498-99. Instead, the County must specify the past discrimination that it is responsible for that it is targeting with its Plan. Id. at 500. Moreover, the County must demonstrate that its past discrimination has present effects. *Podberskey v. Kirwan*, 956 F. 2d 52, 56 (4th Cir. 1992) (citations omitted). Proof of past discrimination generally includes statistical evidence of discrimination and anecdotal evidence. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 338 (1977).

The Defendants have presented extensive statistical evidence of discrimination. The Department first implemented a minority recruitment program in 1974. At that time, out of 290 firefighters, only approximately eight of its firefighters were minorities, and there were no women in the Department. Goddard Aff. I at ¶ 19. The County's labor force was then approximately 41% female and 17% minority. Paper 65, Ex. 10. The County's efforts were largely unsuccessful, and, in June of 1977, only twelve of the firefighters were minorities and there were still no women firefighters. Goddard Aff. I at ¶ 20.

---

[3] Gender based classifications are subject to "intermediate scrutiny," *Faulkner v. Jones*, 10 F. 3d 226, 231 (4th Cir. 1993). Under this test, the classification must be "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). The Court will address both aspects of the Plan together for convenience.

One of the major obstacles to the recruitment of minorities was the firefighter examination. Firefighters are generally considered entry-level employees. *Peightal v. Metropolitan Dade County*, 815 F. Supp. 1454, 1463 (S.D. Fla. 1993), aff'd, 26 F. 3d 1545 (11th Cir. 1994) (citations omitted). This examination, however, required knowledge gained through experience as a firefighter. The only individuals with such experience were volunteer firefighters, and the volunteer firefighter organizations in the county were almost exclusively white male. Goddard Aff. I at ¶ 21. Therefore, as a result, the Department remained almost solely white male.

In 1980, because of its blatant discrimination, the Office of Revenue Sharing of the Department of the Treasury ("ORS") threatened to cut off funding to the Department if it did not act to alleviate its hiring disparities. Paper No. 68 at Ex. 1. The ORS found that the County's relevant labor force was 40.7% female and 16.5% minority, but that the Department was only 1.4% female and 9.9% minority. The ORS required the Department to provide annual reports regarding its progress in curing this disparity. Goddard Aff. I at ¶ 23.

In 1984, pursuant to Section 16-109 of the County Code, the Department adopted a new plan. The 1980 census reported the County's labor force as 47.4% female and 41.5% minority. Paper No. 65, Ex. 10. However, the Department was only 3% female and 19% minority. The Department, therefore, set its five-year goals at 10% female and 40% minority for firefighters. Goddard Aff. I at ¶ 25.

As part of its plan, the Department used new recruiting strategies. These included recruiting at area colleges, advertising in ethnic newspapers, and employing a full-time minority recruitment officer. Goddard Aff. I at ¶ 26.

These efforts were of limited success. By 1987, the Department was 27% minority but was only 2% female. In 1989, the number of females in the Department increased when the Paramedic trainee and Paramedic I/II classes were transferred from the Department's Technician job category into the Protected Services category that previously was reserved for firefighters. Approximately 40% of the transferred paramedics were women. Paper No. 65, Ex. 14. Consequently, at the end of 1989, the Department was 11% female and 29% minority. Goddard Aff. I at ¶ 28.

By end of the 1993, the Department's Protected Services category was 15% female and 38% minority. The Department's affirmative action goals had not been achieved. Paper No. 65, Ex. 11. The County planned to increase its goals in light of the 1990 census which indicated that the County's labor force was 49.9% female and 57.5% minority. Goddard Aff. I at ¶ 29.

The Plaintiffs first argue that there is no valid statistical evidence of discrimination. They argue that the County is not using the relevant statistics as firefighters are not drawn from the general county population, but instead must have a high school diploma. However, the courts have found that there are no special eligibility requirements for firefighters and have used similar statistical comparisons. *Peightal*, 815 F. Supp. at 1463 (citations omitted). Thus, the Defendants are using the proper statistical comparisons.

In addition, the Plaintiffs argue that in fact the evidence demonstrates that there has been no past discrimination by the Department. The Plaintiffs rely largely on one case for that proposition. *See Allen v. Prince George's County*, 538 F. Supp. 833 (D. Md. 1982), aff'd, 737 F.2d 1299 (4th Cir. 1984) (no showing of discriminatory practice in county's hiring). However, that case specifically does not apply to the County's Fire Department. *Allen*, 538 F. Supp. at 836. The Plaintiffs also place great reliance on testimony of members of the Department who stated that they were not personally aware of discrimination by

the Department. Paper No. 67, Ex. 2 at 59; Ex. 23 at 28-29. These officials, however, cannot speak to the Department's prior history. In addition, simply because they were unaware of the discrimination does not mean it did not exist. Accordingly, the Court finds that the Department's statistical evidence establishes a compelling interest to support the Plan.

The Defendants have also presented anecdotal evidence of discrimination in the volunteer fire companies.[4] These companies have traditionally denied memberships to or otherwise discouraged minority and women applicants. For instance, it was commonly known that blacks were not wanted in the companies. Harrod Dep. at 25-26. Black applicants were sent to the "all black station." Grooms Dep. at 66-69. Also, black volunteers were hazed more severely than their white counterparts. Joy Dep. at 62-63. Finally, the other volunteers routinely referred to blacks as "niggers." Allen Dep. at 63.

In addition, women volunteers were subjected to repeated abuse. One woman was told that she couldn't join because she was not a white male property owner. Hennessy Dep. II at 104-05. Women were encouraged not to join (Henry Dep. at 40); they were often called "slut" and "bitch" (Redding Dep. at 102-03; Allen Dep. at 59); most of the stations did not have separate restrooms or sleeping facilities for women (Hennessy Dep. II at 105-08; Redding Dep. at 105-06); one volunteer reported that a male entered the shower area while she was in the shower (J. Edwards Dep. at 64-65); and one volunteer was tied to a pole and sprayed with

---

[4] The Court notes that certain evidence submitted by the Defendants is unpersuasive in this regard. For instance, assuming that diversity alone can serve as a compelling interest, Chief Edwards statements (Edwards Dep. at 33-35) do not show a compelling state interest in this case. *See Hayes v. North State Law Enforcement Officers Ass'n.*, 10 F.3d 207, 213-215 (4th Cir. 1993) (testimony of police chief alone as to merits of diversity in police force not enough to show a compelling interest). Evidence of general societal discrimination (Paper 65, Ex. 16) also does not advance their case. *Croson*, 488 U.S. at 498-99.

shaving cream (Hennessy Dep. II at 107). In short, women "weren't wanted." Redding Dep. at 102; Allen Dep. at 57-58.

These attitudes carried over into the Department itself. For example, blacks were not allowed to drive the trucks as soon as whites. Grooms Dep. at 21; Joy Dep. at 21-22; Jones Dep. at 15-16. Also, other firefighters often referred to them as "nigger." Grooms Dep. at 26-27, 40; Powell Dep. at 23-25. In still another incident, a black firefighter came into work one morning to find on his desk a cross inscribed with "R.I.P." and decorated with a sheet designed like a Klansman's hood. Grooms Dep. at 39-40. Members of the Department found this sort of behavior amusing. Grooms Dep. at 39-40.

Similarly, there were repeated instances of harassment and discrimination against female firefighters. Offensive comments were hardly uncommon (Norton Dep. at 17-21) and the comments sometimes escalated into offensive touching (Norton Dep. at 25). Female firefighters also endured being shown X-rated movies (J. Edwards Dep. at 33) and being told they were there to "sleep their way to the top" (Redding Dep. at 21). Finally, like blacks, women were not allowed to drive fire apparatus. Hennessy Dep. II at 51. In sum, it was well known that females and minorities were not welcome in the Department. Goddard Aff. I at ¶ 21.

Furthermore, although the situation in the Department has greatly improved, there remain lingering effects of the Department's past discrimination. For instance, it is still regarded as a male dominated profession where women are not wanted. J. Edwards Dep. at 67-68. Women are still harassed in the Department. J. Edwards Dep. at 45-46. Also, the Department has still not met its goals for hiring minorities and women. Powell Dep. at 43. Additionally, the "good old boy" network still operates to help prevent the hiring of blacks. Grooms Dep. at 71. Thus, the Court finds that there are present effects of the Department's past discrimination.

The Plaintiffs do not deny that there have been racist and discriminatory actions taken against minorities in the past by the volunteer companies. Instead, they argue that the evidence of discrimination must result from the Department's own hiring policies. They maintain that the actions of the volunteer companies are not attributable to the County. *See Krieger v. Bethesda-Chevy Chase Rescue Squad*, 599 F. Supp. 770 (Md. 1984), aff'd, 792 F. 2d 139 (4th Cir. 1986) (volunteer rescue squads are not state actors).

The disparities within the Department, however, are a natural consequence of the Department's hiring policies. For example, the Department's examination, as recently as 1978, favored those with volunteer experience. Powell Dep. at 10-12; Joy Dep. at 15-17; Harrod Dep. at 24-27; Jones Dep. at 9-10. Moreover, the Department did most of its advertising through word of mouth at the volunteer stations. Goddard Aff. I at 19. Naturally, women and minorities did not learn about job openings under these circumstances. The Department cannot simply attribute these blatant discriminatory policies to the volunteer organizations. *See Ensley Branch N.A.A.C.P. v. Seibles*, 31 F. 3d 1548, 1566-67 (11th Cir. 1994) (discrimination against blacks at entry level naturally led to discrimination against blacks in promotion) (citations omitted). *See also Adickes v. Kress Co.*, 398 U.S. 144, 152 (1970) (state action exists when private individuals act in concert with state officials). Therefore, the Court finds that the Department has shown the necessary compelling interest to support an affirmative action plan.

2. *Narrowly Tailored*—An affirmative action plan must be "narrowly tailored to the achievement of that goal." Croson, 488 U.S. at 505-507. In determining whether a plan is narrowly tailored, the courts have considered several factors: (1) the efficacy of alternative remedies; (2) the planned duration of the remedy; (3) the relationship between the percentage of minority workers to be employed and the percentage of minority groups in the relevant population; (4) availability of waiver

provisions; and (5) the effect of the plan on innocent third parties. *United States v. Paradise*, 480 U.S. 149, 187 (1987); *Hayes*, 10 F. 3d at 216 (citations omitted).

i. *Alternative Remedies*—The Plaintiffs argue that alternative steps can be used instead of the Plan. They contend that simply making an effort to recruit minorities will be effective and eliminating the preference for volunteers can alleviate the effects of past discrimination. In short, they maintain that the Plan is not necessary.

The Court is not persuaded by this argument. The alternative remedies (e.g., changing the written test and intensifying minority recruitment) attempted were not effective in achieving the goals of the Plan. Paper No. 65, Exhibit 14. Finally, the Department may take affirmative steps to remedy past discrimination rather than simply forbidding discrimination in the future. *Adarand Constructors, Inc.*, 63 U.S.L.W. 4523, 4542 (Souter, J., dissenting) (citations omitted).

ii. *Duration*—An affirmative action plan will not pass strict scrutiny if it is of unlimited duration. *Hayes*, 10 F.3d at 216-217; *Maryland Troopers Ass'n., Inc. v. Evans*, 993 F.2d 1072, 1076 (4th Cir. 1993) (plans "may not take on a life of their own."). The Plaintiffs argue that the Plan suffers from this weakness. They contend that the County will continue the plan as long as the firefighters do not exactly mirror the County wide population.

The Court is not persuaded by this argument. The Plan is limited in duration and is reviewed annually to see if its goals have been achieved. Knapp Dep. at 11-12; 18; 52. Moreover, there is no evidence to support the Plaintiff's argument. Accordingly, the Court finds that the Plan has a limited duration. Fed. R. Civ. P. 56(e).

iii. *Relationship Between Work Force and Population*—The Department's Plan is designed to remedy present racial and gender imbalances resulting from past discrimination. As noted

above, the County may use the general labor force as a comparison in choosing its firefighters. *Pieghtal* [sic], 26 F. 3d at 1553-55 (citations omitted). The Department, of course, should utilize goals that reflect the current population of the County. *Mackin v. City of Boston*, 969 F.2d 1273, 1276-77 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 1043 (1993). Thus, the Court finds that the Plan is narrowly tailored in this regard. Paper 65, Ex. No. 14.

iv. *Waiver Provisions*—An important attribute of the Plan is its flexibility. The Plan does not require that Department hire a certain number of minorities. For example, in 1993, the County sought to hire five female applicants. However, when five could not be found in the outstanding or well-qualified bands, it chose to hire only four. Goddard Aff. I at ¶ 6. Accordingly, the Plan does not have the trappings of a quota, and the availability of waivers shows that the Plan is narrowly tailored. *See generally Mackin v. City of Boston*, 969 F.2d at 1278.

v. *Impact on Innocent Third Parties*—The Plan does not have a severe impact on innocent third parties. First, it does not bar hiring, and the Department continues to hire many white males. Paper 65, Exhibit 13—Response No. 8. Denial of a possible employment opportunity is less drastic than terminating an existing employee based on race. *Paradise*, 480 U.S. at 189 (quoting *Wygant*, 476 U.S. at 282-83). Moreover, the Plan only gives a preference, not a guarantee of employment, to well-qualified minorities. *Mackin*, 969 F.2d at 1278 (citations omitted). Finally, as noted above, all individuals within a given band are regarded as equally qualified for hire. Therefore, in light of each of these factors, the Court concludes that the Plan is narrowly tailored.

F. *Claims Against Defendants In Their Individual Capacities.*

The Plaintiffs have also raised claims against Defendants Estepp, Goddard, Hennessy, and Tyler in their individual capacities. Of course, qualified immunity protects government officials "performing discretionary functions. . .

from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (citations omitted).

Assuming arguendo that the Plan is unconstitutional, the Court finds that these Defendants are entitled to qualified immunity in this case. They acted pursuant to an affirmative action plan as instructed by the County Council and Executive. The Plan can hardly be said to so clearly violate the *Croson* standard that individual liability is warranted. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1985) (citations omitted).

Accordingly, the Defendants' motion will be granted and the Plaintiff's motion will be denied. A separate Order will issue.

10/11/95

Alexander Williams, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARC ALEXANDER, *et al.*, *Plaintiffs,* v. PRINCE GEORGE'S COUNTY, MARYLAND, *et al.*, *Defendants.*	CIVIL NO. AW-93-2636 Consolidated with CIVIL NO. AW-94-2090

ORDER

(Filed October 11, 1995)

In accordance with the Memorandum Opinion, it is this 11th day of October 1995 ORDERED:

1. That the Plaintiffs' Motion for Partial Summary Judgment BE, and the same hereby IS, DENIED; and

2. That the Defendants' Motion for Summary Judgment BE, and the same hereby IS, GRANTED; and

3. That judgment is ENTERED for the Defendants; and

4. That the Clerk of the Court CLOSE this case and mail copies of the Memorandum Opinion and this Order to all counsel of record.

Alexander Williams, Jr.
United States District Court
Judge

CONSTITUTIONAL, STATUTORY AND MISCELLANEOUS PROVISIONS

CONSTITUTIONAL PROVISIONS

United States Constitution, Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at

such Place or Places as the Congress may by law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

United States Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Maryland, Article XI-A

Section 1. [T]he charter board, . . . or a majority thereof, shall prepare . . . a charter or form of government for said city or such county. . . . Such charter shall be submitted to the voters of said City or County at the next general or Congressional election . . . and if a majority of the votes . . . shall be in favor of such adoption, the said charter . . . shall become the law of said City or County. . . .

Section 3. Every charter so formed shall provide for an elective legislative body in which shall be vested the lawmaking of [the] County. Such legislative body . . . in any

county shall be known as the County Council of the County. The chief executive officer, if any such charter shall provide for the election of such executive officer . . . shall be known . . . in any County as the President or Chairman of the County Council of the County.

STATUTES—FEDERAL

42 U.S.C. § 1981

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person

within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATUTES AND ORDINANCES—STATE AND COUNTY

Maryland Annotated Code, Art. 25A, Section 5

The following enumerated express powers are granted to and conferred upon any county or counties which hereafter form a charter under the provisions of Article XI-A of the Constitution, that is to say: . . . (A) . . .

(1) To enact local laws for the county, including the power to repeal or amend local laws of the county enacted by the General Assembly upon the matters covered by the express powers in this article. . . .

Prince George's County Code, Section 16-109 (1976)

Section 16-109. Equal employment opportunity

(a) It shall be wrongful and illegal for any appointing authority, supervisor, or the Personnel Officer to take any action pursuant to the provisions of this Subtitle with respect to any employee, any applicant for employment, or any former employee seeking reinstatement, reemployment, or reappointment, where any such action would constitute a discriminatory action, as defined in Section 16-102(a)(18). In furtherance of the foregoing, it shall be the policy of Prince George's County, Maryland, to provide equal opportunity in County employment for all persons and to promote the full realization of said equal employment opportunity through

the development and continued maintenance of an affirmative action program within all departments, agencies, and offices of County government. The aforesaid declaration of policy regarding equal employment opportunity shall apply to all aspects of the personnel system established by this Subtitle, including, but not limited to, the areas of classification, recruitment, promotion, training, compensation, and fringe benefits.

(b) In order to properly effectuate the policies set forth in Subsection (a), above, the County Executive shall, by Executive Order, establish the components of an affirmative action program for the County and assign specific duties and responsibilities, as appropriate, to the Chief Administrative Officer, the Personnel Officer, the Equal Employment Opportunity Officer, appointing authorities, supervisors, and employees, with respect to the development, implementation, monitoring, and evaluation of the various components of said program. The aforesaid Executive Order shall be developed and issued so as to give full force and effect to all applicable rules, regulations, and guidelines authorized and promulgated pursuant to the Equal Employment Opportunity Act of 1972 (Public Law 92-261), and shall address the employment opportunities and needs of physically and mentally handicapped persons as if they were a class of persons protected under the provisions of the foregoing Federal statute.

Prince George's County Code, Section 16-162 (1976, 1981)

Sec. 16-162. Establishment and maintenance of eligibility registers.

(d) Order of Names on Register. . . .

(3) Joint Promotion/Recruitment Registers. The Personnel Officer shall first arrange the names of all eligibles on any joint promotion/recruitment eligibility register, whether

continuous or temporary, in descending order with the name or names of the eligible or eligibles assigned the highest rating placed at the top of any such register. Then, the final order of the names of all eligibles on such register shall be determined in accordance with the following procedures:

(A) Where the eligibles on any such register have been assigned numerical or ordinal ratings, the range of the ratings on such register shall be divided into three (3) separate subranges, as appropriate, based on the nature of the range of ratings. The Personnel Officer shall then arrange the names of all eligibles within each such subrange into the following priority categories:

(i) All eligibles who are seeking promotion, if any, shall be ordered, by rating, above all other eligibles identified in subparagraphs (ii), (iii), (iv), (v), (vi), (vii), and (viii), below;

(ii) All disabled veteran eligibles who are seeking initial appointment, if any, shall be ordered, by rating, above all other eligibles identified in subparagraphs (iii), (iv), (v), (vi), (vii), and (viii), below;

(iii) All nondisabled veteran eligibles who have formerly served as volunteer firefighters and are seeking initial appointment as a full-time career firefighter, emergency medical technician, or paramedic, if any, shall be ordered, by rating, above all other eligibles identified in subparagraphs (iv), (v), (vi), (vii), and (viii), below;

(iv) All other nondisabled veteran eligibles who are seeking initial appointment, if any, shall be ordered, by rating, above all other eligibles identified in subparagraphs (v), (vi), (vii), and (viii), below;

(v) All other nonveteran eligibles who have formerly served as volunteer firefighters and are seeking initial appointment as a full-time career firefighter, emergency medical technician, or paramedic, if any, shall be ordered, by rating, above all other eligibles identified in subparagraphs (vi), (vii), and (viii), below;

(vi) All other nonveteran eligibles, if any, who are "displaced homemakers" shall be ordered, by rating, above all other eligibles identified in subparagraphs (vii) and (viii), below;

(vii) All other nonveteran eligibles who are seeking initial appointment and who have certified on their examination applications that they are currently residing within Prince George's County, if any, shall be ordered, by rating, above all other eligibles identified in subparagraph (viii), below, and,

(viii) All other nonveteran eligibles who are seeking initial appointment and who have certified on their examination applications that they are not currently residing within Prince George's County, if any, shall be ordered, by rating, in the last priority category; . . .

(4) Suspension of Volunteer Firefighter Preference Rankings. Whenever the Personnel Officer determines that the ranking of eligibles for appointment to a vacant position as a full-time career firefighter, emergency medical technician, or paramedic will have a disparate effect on a protected class as defined by the guidelines of the Equal Employment Opportunity Commission, upon written certification to the County Executive and the Fire Chief, he shall rank eligibles without regard to the preference for prior service as a volunteer firefighter.

MISCELLANEOUS

Charter of Prince George's County, Maryland, Art. V

Section 501. Supervision and Control.

Except as otherwise provided in this Charter or in State law, all agencies of the County government shall be subject to the direction, supervision, and control of the County Executive.

Section 502. Structure.

All functions and duties of the executive branch shall be allocated among and within such agencies as may be established by law.

Section 503. Reorganization.

The County Executive may propose changes in the organization of the executive branch, including the establishment or abolition of agencies, and in the assignment of functions, powers, and duties among agencies. Reorganization proposals shall be set forth in executive orders in statutory form and be submitted to the Council. Such executive order shall become effective and have the force of law sixty calendar days after submission unless disapproved by majority vote of the full Council.

The Prince George's County Government,
Order of County Executive No. 15-1983, April 6, 1983

WHEREAS, it is the policy of Prince George's County to provide equal opportunity to all of its employees and applicants for employment in matters of hiring, promotion, transfer, training, compensation, benefits and all other terms, privileges and conditions of employment, without regard to race, sex, color, religion, creed, national origin, political opinion, marital status, age, physical or mental handicap, or physical appearance; and

WHEREAS, the implementation of this policy will require special affirmative action to assure equal opportunities for all, it is also the County's policy both to take affirmative steps to seek out employees at any level whose potential has not been fully utilized, with the objectives of assisting them in reaching full potential and to utilize the resources and promise of the community whenever it is necessary to fill an opening from outside the existing work force; and

WHEREAS, Equal Employment Opportunity is the law, mandated by federal, state, and local legislation, presidential Executive Orders and definitive court decisions; and

WHEREAS, a successful affirmative action program not only benefits those who have been denied equal employment opportunity but also provides positive benefits to the County through fuller utilization and development of the untapped human resources and skills of minority groups and women.

NOW THEREFORE, BE IT ORDERED, that by the power vested in me by Article V, Sections 501, 502, and 503 of the Charter of Prince George's County, Maryland:

1. The Chief Administrative Officer is designated as the Affirmative Action Officer for Prince George's County and will be responsible for ensuring compliance with the letter and spirit of the aforementioned policy.

2. The Personnel Officer will be responsible for the programmatic development, coordination, implementation and monitoring of this program. Periodic reports shall be prepared for the Chief Administrative Officer.

3. Each department/agency head shall be responsible for the application of said Equal Employment and Affirmative Action policies and shall beheld accountable for attainment of stated Affirmative Action goals.

4. Department/agency heads shall be held responsible for ensuring that all personnel understand and carry out the Equal Employment and Affirmative Action policies.

5. All allegations of discrimination instituted against Prince George's County, pursuant to Section 16-203(g) of the County Code, 1975 Edition, as amended, shall be filed with the Personnel Board.

This order rescinds Executive Order No. 60-1979 in its entirety.

Parris N. Glendening
County Executive

No. 96-889 (2)

Supreme Court, U.S.
FILED
MAR 13 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

PRINCE GEORGE'S COUNTY MARYLAND, *et al.*,

Petitioners,

v.

MARC ALEXANDER, *et al.*,

Respondents.

On Petition of a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL F. GOLDSTEIN*
JOSEPH B. ESPO
LAUREN E. WILLIS
BROWN, GOLDSTEIN & Levy, LLP
Suite 300 Maryland Bar Center
520 West Fayette Street
Baltimore, Maryland 21201
(410) 962-1030
* *Counsel of Record*

Attorneys for Respondent

March 13, 1997

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

16 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 1

CORRECTIONS TO PETITIONERS' FACTUAL AND PROCEDURAL STATEMENTS 1

ARGUMENT 4

1. There is No Compelling Reason to Grant the Writ. 4
2. The Court of Appeals Did Not Err in Declaring Unconstitutional the Prince George's County, Maryland Fire Department's Affirmative Action Hiring Practice. 6
3. The Court of Appeals Did Not Err in Declaring Unconstitutional the Gender-Based Component of the Prince George's County, Maryland Fire Department's Affirmative Action Hiring Practice. 10

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Adarand Constructors, Inc. v. Pena, __ U.S. __, 115 S. Ct. 2097 (1995) 5

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 4,7

City of Richmond v. J.A. Croson Co., 822 F.2d 1355 (4th Cir. 1987), affd, 488 U.S. 469 (1989) 4

Coral Construction Co. v. King County, Washington, 941 F.2d 910 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992) 8

Ensley Branch NAACP v. Seibles, 31 F.3d 1548, 1572 (11th Cir. 1994) 11

Erwin v. Daley, 92 F.3d 521 (7th Cir. 1996) 5

Hayes v. North State Law Enforcement Officers Association, 10 F.3d 207 (4th Cir. 1993) 4,9

Maryland State Troopers Association, Inc. v. Evans, 993 F.2d 1072 (4th Cir. 1993) 4,9

Piscataway Township Board of Ed. v. Taxman, 91 F.3d 1547 (3d Cir. 1996) 9

Podberesky v. Kirwan, 956 F.2d 52 (4th Cir. 1992) . 4,10

United States v. Virginia, __ U.S. __, 116 S. Ct. 2264 (1996) 5,10

Rules

Supreme Court Rule 15.2 1

Statutes and Ordinances--State and County

Prince George's County Ordinance, § 16-162(4) 8

SUMMARY OF ARGUMENT

In the instant case, the Court of Appeals struck down a race- and gender-based hiring system, maintained by the Fire Department of the Petitioner County, that had been implemented in the mid-1980s and had continued long beyond its usefulness for eradicating past discrimination. The Court of Appeals based its decision on the application of equal protection scrutiny to the hiring system.

Petitioners ask this Court to grant a writ of certiorari in this matter because, they contend, the Court of Appeals misapplied the law of equal protection to the facts of this case. *See* Petition for Writ of Certiorari at 11. Supreme Court Rule 10 provides, however, that a petition for a writ of certiorari is "rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Because there is no compelling reason to grant the writ, and because the Court of Appeals did not misapply the law, certiorari should be denied.

CORRECTIONS TO PETITIONERS' FACTUAL AND PROCEDURAL STATEMENTS

Mindful of the admonishment in Supreme Court Rule 15.2, Respondents note the following corrections to Petitioners' statements.

First, contrary to Petitioners' claim, *see* Petition for Writ of Certiorari at 13 & 15, the Court of Appeals did not "accept" that the Petitioners proven that the Fire Department's hiring practice was justified by a compelling interest in remedying past discrimination. Rather, the Court of

Appeals noted that the parties disagreed as to whether the Petitioners had shown a compelling interest, and declined to rule on that issue, proceeding instead to strike down the race- and gender-based system as insufficiently related to the Department's allegedly compelling interests to survive constitutional muster. *See id.* at A-8 - A-9.

In fact, the record strongly supports the conclusion that race- and gender-based hiring was adopted and/or continued for political reasons instead, to attempt to mimic the changing voter demographics in the County. *See, e.g., id.* at 3 & A-5.[1] Further, the anecdotal evidence did not document race and gender hiring discrimination "throughout [the Fire Department's] history," *id.* at 7, but rather showed race and gender harassment of employee and volunteer firefighters in the 1970s and early 1980s, and even then, primarily at the volunteer firefighter stations, not at the Department.

The Court of Appeals never "accepted the District Court's findings . . . that the Plan was limited in duration, was flexible, did not impose quotas, and did not impinge inappropriately upon the rights of non-minorities," as claimed by Petitioners. *See id.* at 15. Acceptance of such findings would have been contrary to the evidence: Because Petitioners' "hiring goals" changed as the County's demographics changed and because the trends in the County indicate that these demographics are continually changing, *see id.* at A-5,

---

[1] In 1974, when the Fire Department embarked on a minority recruitment program, the County's labor force was 17% minority. In 1984, when the Department began its practice of hiring based on race and gender, the Department was 20% minority. At that time, the Department established a new goal that 39% of its firefighter workforce be minorities to reflect the 1980 census figures for the County.

the reality is that the hiring practice was limitless in duration.[2] The Department had established no waiver provisions, and instead imposed rigid quotas on the number of white males who could be hired each recruit class, *see id.*, even going so far as to leave a position unfilled when a qualified nonminority candidate could not be located. The Department did impose quotas -- not on the number of minorities and women, but on the number of white males -- and whether one calls them "informal caps", *id.* at n.3, or "quotas", the meaning is the same. Finally, the hiring practice did impinge upon the rights of nonminorities: Nonminorities were denied an equal opportunity to compete for jobs solely because of their skin color and gender.

The Court of Appeals did not base its holding that the practice was not narrowly-tailored solely on the hiring system's overinclusiveness. *See id.* at 5. Rather, the Court of Appeals assumed *arguendo* that the practice was intended to serve a compelling interest and held that it nevertheless violated the Constitution because it was not narrowly-tailored in at least the following three respects: (1) less drastic means than racial classifications could have been used to achieve the interests alleged, in that the preference for volunteer firefighters, when the volunteer firefighting departments were the locus of past discrimination, could have been suspended; (2) among those benefitted at the expense of nonminority candidates were Hispanic and Asian minorities who had never suffered past discrimination by the Department, and thus no compelling interest was served by their inclusion; and (3) the

---

[2] Having come by 1993 within one percentage point of achieving its goal of 39% minority firefighters, the Department declared its intention to establish a new goal of 57.5% minority based on the 1990 census.

practice was unwritten and thus not capable of being applied in a fair and consistent manner. *See id.* at A-8 - A-9.[3]

ARGUMENT

1. There is No Compelling Reason to Grant the Writ.

The law of equal protection has been clear since 1989, if not before, that race- and gender-based affirmative action hiring must comport with equal protection principles. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). The standard for race-based hiring is strict scrutiny, which requires that the program be narrowly tailored to serve a compelling government interest. *Id.* There is nothing "will-o'-the-wispish", Petition for Writ of Certiorari at 3, about this standard, which has been reiterated many times in this Circuit both before and after 1989. *See, e.g., Hayes v. North State Law Enforcement Officers Ass'n,* 10 F.3d 207 (4th Cir. 1993); *Maryland State Troopers Ass'n, Inc. v. Evans,* 993 F.2d 1072 (4th Cir. 1993); *Podberesky v. Kirwan,* 956 F.2d 52 (4th Cir. 1992); *City of Richmond v. J.A. Croson Co.*, 822 F.2d 1355 (4th Cir. 1987), *aff'd* 488 U.S. 469 (1989).[4]

---

[3] The County had issued a County-wide written Affirmative Action Plan that set goals and outlined implementation strategies, none of which involved race- or gender-based hiring. Nothing in the written Plan was challenged by Respondents; rather, it was the Department's unwritten practice of capping the number of white males in each recruit class that was challenged, and was held unconstitutional by the Court of Appeals.

[4] Whether or not *Croson* was adequate to put a reasonable official on notice of the Constitutional requirements that an

The Court of Appeals did not "misconceive" the applicable law, as asserted by Petitioners, *see* Petition for Writ of Certiorari at 10, but rather applied the governing law to the instant facts, and did so correctly. Nothing in any of the precedents cited by Petitioners supports the grant of a writ of certiorari where, as here, the Court of Appeals properly understood the law.

The standard for gender-based hiring is somewhat less clear, both in the Court of Appeals decision below and in the governing jurisprudence generally. *Compare, e.g., United States v. Virginia,* __ U.S. __, 116 S. Ct. 2264, 2275 (1996) (applying intermediate scrutiny to gender-based classifications), *with, e.g., Adarand Constructors, Inc. v. Pena,* __ U.S. __, 115 S. Ct. 2097, 2103 (1995) (analyzing under strict scrutiny a disadvantaged business enterprise program that gave preferences to minorities and women). Nevertheless, the requirement that, at a minimum, the means used by an affirmative action Plan for women must be closely related to the ends is plainly good law. This was the test used by the Court of Appeals, *see* Petition for Writ of Certiorari at A-8 ("[T]he means chosen by the department [were] not related

---

affirmative action program must meet, these cases in the Fourth Circuit certainly provided more than adequate notice. Thus, contrary to the statements made by the petitioners in their petition for a writ of certiorari in the case *Erwin v. Daley*, 92 F.3d 521 (7th Cir. 1996), the opinion of the Court of Appeals in this case does not conflict with the opinion of the Seventh Circuit in that case. Further, the Petitioners here do not raise the denial of qualified immunity as a question presented in their Petition, and therefore this Court should not grant the writ on the basis of some hypothetical conflict with the Seventh Circuit's holding on qualified immunity in *Erwin*.

closely enough to the interests asserted."), and the Court applied the test properly.

2. The Court of Appeals Did Not Err in Declaring Unconstitutional the Prince George's County, Maryland Fire Department's Affirmative Action Hiring Practice.

Whether or not a compelling reason existed for race-based hiring in 1993 and 1994, the Court of Appeals properly held that the hiring practice chosen by the Department was not sufficiently closely related to this allegedly compelling end.

Hiring members of minority groups that have not suffered prior discrimination by the Department ahead of more qualified white males is not only not substantially related to the asserted goal of remedying past discrimination against African-Americans and women, it is entirely unrelated to that alleged goal. The fact that these "other" minorities did not suddenly appear in the Department ranks in lock-step proportion to their residency rate in the County is not even statistically sound evidence of societal discrimination,[5] never

---

[5] This is so for at least two reasons: (1) the rate at which a group moves into a county should be compared to the rate of hire, not the already-hired workforce (for example, if all the Asians moved into the County in 1990, but the Department had not hired anyone new in 1990, then the resultant disparity between the population and the Department's workforce in 1991 has no statistical significance); (2) the sample sizes involved are too small to generate statistical significance (very few recruits per class and very few "other" minorities in the population). Further, there was no evidence placed in the record about whether personal predilections for firefighting or physical and educational qualifications for firefighting occur at the same rates for all groups.

mind legally sound evidence of lingering effects of discrimination at the Department. *Cf. Croson*, 488 U.S. at 505-06 (societal discrimination is insufficient to justify race-based hiring; such hiring is only constitutional when it is based on proven lingering effects, at the hiring entity, of discrimination). The fact that only a "handful" of "other" minorities benefitted from the Plan, *see* Petition for Writ of Certiorari at 16, does not excuse the unconstitutional practice; each and every one of those "other" minorities hired represents a job denied, on the basis of gender and skin color, to another applicant. Indeed, Respondent Reedy was passed over to favor a "male other" who Petitioners "believe" was Asian.

Utilizing a race- and gender-based hiring system before suspending the volunteer preference, when the volunteer fire departments were the locus of the alleged prior discrimination and harassment, is plain evidence of insufficient tailoring.[6] The Court of Appeals did not demand that the Department try every alternative under the sun before using race- and gender-based affirmative action hiring, but did demand, properly, that the Department at least try the option approved by the County itself to remedy disparate hiring -- suspending the

---

[6] Although Petitioners now appear to claim that the volunteer fire departments do not discriminate, *see* Petition for Writ of Certiorari at 19, this position conflicts with their claim that past discrimination in volunteer companies still lingers to such an extent that race- and gender-based hiring is necessary. Petitioners cannot have it both ways. Either the effects do not linger, in which case the hiring practice is unconstitutional because it does not serve an important or compelling government interest, or the effects do linger, and suspending the volunteer preference must be attempted before implementing race- and gender-based hiring.

volunteer preference.[7] To ignore the option already approved by the County for this purpose demonstrates a lack of "good faith consideration of race-neutral alternatives," *see* Petition for Writ of Certiorari at 18 (quoting *Coral Constr. Co. v. King County, Washington*, 941 F.2d 910, 923 (9th Cir. 1991), *cert. denied,* 502 U.S. 1033 (1992)), which even Petitioners admit is required to pass constitutional muster.[8]

The unwritten nature of the hiring practice further rendered it insufficiently tailored to its alleged ends. For example, Petitioner Hennessey was initially instructed to hire no more than four white males and at least five women for the June 1993 recruit class of thirteen, but when her boss was replaced, she was told that five women were not required, so that she could hire an additional minority male. Race- and gender-based hiring that is so amorphous that the quotas on white males or the relative weight to be given the gender of a white woman applicant versus the race of a black male

---

[7] Under Prince George's County Ordinance, § 16-162(4), the County Personnel Officer may suspend the volunteer firefighter preference upon determining in writing that the preference has a disparate impact on a protected class.

[8] Although Respondents have no reason to doubt that volunteer experience is beneficial to firefighting, the decision by the County to pass over white male applicants with volunteer experience in favor of minority and women applicants without such experience, proves that the Plan here was costly not only to the applicants who were denied jobs on the basis of their gender and ethnicity, but was also costly to firefighting in the County. In addition, the Petitioners failed to show that other race-neutral practices were ineffective. As early as 1984, as a result of aggressive recruitment practices, two-thirds of the firefighter applicants were minorities.

applicant, changes at the whim of an administrator, is *per se* unconstitutional for lack of a clear relationship between the race- and gender-based methods used and the alleged ends of rectifying past discrimination. Indeed, because the unwritten practice consisted solely of hiring to meet certain race and gender goals as set for each recruit class, there were no boundaries at all. In furtherance of the goals, the Department passed over white males and, in one instance, a white female, who were ranked higher by statutory preference than the persons actually hired. But nothing in the unwritten practice limited Petitioners only to ignoring preferences. Those charged with meeting the hiring goals had "*carte blanche*" -- the converse of "narrowly tailored."[9]

Finally, the Court of Appeals quite properly relied on its precedents in coming to the conclusion that the Department's practice was not sufficiently closely related to the alleged ends to pass constitutional muster. *Hayes v. North State Law Enforcement Officers Ass'n,* 10 F.3d 207, and *Maryland State*

---

[9] For this reason, the instant case is distinct from *Piscataway Township Bd. of Ed. v. Taxman*, 91 F.3d 1547 (3d Cir. 1996), because in that case, the hiring practice was narrowly defined as choosing a minority over a nonminority employee when both were of equal seniority and qualifications. In the instant case, there is no limit on the test score and statutory preference rankings that can be ignored in limiting white male hires. This case also does not present the question presented in the Petition for Certiorari in *Taxman* of whether the provision of minority and women role models can be a compelling government interest, because in this case, the Fourth Circuit found Petitioners' practice insufficiently tailored irrespective of whether a compelling interest was shown. Further, Petitioners here do not raise the role model issue as a question presented in their Petition, and therefore this Court should not grant the writ here on the basis of some hypothetical conflict with the Third Circuit's holdings in *Taxman*.

Troopers Ass'n, Inc. v. Evans, 993 F.2d 1072, both elaborated upon the strict scrutiny standard for race-based employment decisions established by *Croson*. The strict scrutiny standard is the same for all race-based employment decisions, including both hiring and promotions. *Podberesky v. Kirwan,* 956 F.2d 52, analyzed a state university's scholarship-granting policies, where some scholarship funds were available to all races and genders, and some scholarship funds were limited to minorities. In the instant case, there are some positions available to all races and genders (the quota or "capped" number), and the remainder are available only to minority and female applicants. Thus, *Podberesky* is analogous to the instant case, and the Court of Appeals properly looked to that case in analyzing this case.

3. The Court of Appeals Did Not Err in Declaring Unconstitutional the Gender-Based Component of the Prince George's County, Maryland Fire Department's Affirmative Action Hiring Practice.

Although the Court of Appeals was not terribly explicit in so doing, its striking of the gender-based component was nevertheless mandated by Equal Protection. Arguably, gender-based affirmative action hiring is subject to intermediate scrutiny, such that the gender-based hiring is constitutional if it is substantially related to serving an important governmental interest. *See United States v. Virginia*, __ U.S. at __, 116 S. Ct. at 2275. However, even with this weaker standard than that required for race-based affirmative action, the hiring practice does not meet this test.

Even assuming, *arguendo,* that the government interest in 1993 and 1994 in hiring based on gender was important, "the means chosen by the department [were] not related

closely enough to the interests asserted." Petition for Writ of Certiorari at A-8. The Court of Appeals correctly pointed to three ways in which the hiring practice was not sufficiently tailored to achieve either the race-based or gender-based interests asserted: failure to suspend volunteer preference, overinclusiveness, and unwritten nature. *Id.* at A-8 - A-9.

Regarding gender however, there are additional ways in which the system of race-and gender-based hiring was not substantially-related to the asserted goal of remedying past discrimination. For example, the preference for veterans, for which the County has given no justification, and which despite recent demographic changes in the armed forces still operates against women, was not eliminated. Further, Petitioners have proffered no evidence of attempts short of gender-based hiring to convince more qualified women to join the force, such as through sex-discrimination education, prompt and well-publicized disciplinary actions against harassers, etc. Although Petitioners presented evidence of harassment of women in the 1970s and early 1980s, gender-based hiring is not substantially related to fighting sexual harassment. Although the relationship between the means (gender-based hiring) and the ends (eliminating harassment) is probably rational, it is not substantial, and thus fails intermediate scrutiny. Two constitutional wrongs do not make a constitutional right. *See, e.g., Ensley Branch NAACP v. Seibles*, 31 F.3d 1548, 1572 (11th Cir. 1994) (refusing to accept the "institutionalized discrimination" created by an employment plan that permits a government employer to continue to use discriminatory hiring criteria "and then attempt to cure the resulting injury to [the group discriminated against] with . . . affirmative action").

CONCLUSION

Petitioners' assertion that the Court of Appeals misapplied existing law is mistaken. The hiring practice of Petitioners fell short of the plain meaning of strict scrutiny, and the reasoning expressed by the Court of Appeals sounds no note discordant with the directions issued by this Court.

For the foregoing reasons, Respondents respectfully request that this Court exercise its discretion to deny the Petition for Writ of Certiorari.

Respectfully submitted,

DANIEL F. GOLDSTEIN*
JOSEPH B. ESPO
LAUREN E. WILLIS
Brown, Goldstein & Levy, LLP
Suite 300 Maryland Bar Center
520 West Fayette Street
Baltimore, Maryland 21201
(410) 962-1030
* *Counsel of Record*

March 13, 1997 *Attorneys for Respondents*